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In The

# Supreme Court of the United States

October Term, 1984

Mitsui & Company (U.S.A.), Inc.; Mitsui Bussan Kabushiki Kaisha; VSL Corporation, Inc.; Shinko Wire Co., Ltd. and Losinger AG,

*Petitioners,*

v.

Western Concrete Structures Co., Inc.,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether vertical agreements to sell products at fully profitable, above-cost prices can constitute a conspiracy in restraint of trade actionable under section 1 of the Sherman Act or the Wilson Tariff Act simply because the price is below the level imposed by a protectionist trade statute.

2. Whether vertical agreements to sell products at fully profitable, above-cost prices can constitute "predatory pricing" and thereby support a claim under section 2 of the Sherman Act.

3. Whether the Sherman Act provides a remedy for a claim of unfair competition based on alleged violations of a protectionist trade statute.

## PARTIES

All parties in the Court below are parties to this Petition. Petitioners-defendants are Mitsui & Company (U.S.A.), Inc., a New York corporation; Mitsui Bussan Kabushiki Kaisha, its Japanese parent corporation; VSL Corporation, Inc., a California corporation; Losinger AG, its Swiss parent corporation; and Shinko Wire Co., Ltd., a Japanese corporation. Pursuant to Rule 28.1, subsidiaries and affiliates of these parties are listed in Appendix B (filed separately).

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Brodley and Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards,* 66 Cornell L.Rev. 738 (1981) ..... 20, 21

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October Term, 1984

Mitsui & Company (U.S.A.), Inc.; Mitsui Bussan Kabushiki Kaisha; VSL Corporation, Inc.; Shinko Wire Co., Ltd. and Losinger AG,

*Petitioners,*

v.

Western Concrete Structures Co., Inc.,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Ninth Circuit in its Case No. 83-2464, entitled *Western Concrete Structures Co. v. Mitsui & Co. (U.S.A.).*

## OPINIONS BELOW

The opinion of the Court of Appeals' majority and the related dissenting opinion are reported at 760 F.2d 1013 (9th Cir. 1985) and are printed in Appendix A, pp. 1-17. The orders of the District Court granting the motions

to dismiss the First Amended Complaint and the Second Amended Complaint are printed at Appendix A, pp. 18-23.

## JURISDICTION

The final judgment of the Court of Appeals was entered on May 17, 1985. No petition for rehearing was filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

## STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, are set forth in Appendix A, pp. 43-44. The Wilson Tariff Act, 15 U.S.C. § 8, is set forth in Appendix A, pp. 44-45. Relevant excerpts from the 1921 Antidumping Act, 19 U.S.C. § 160 *et seq.*, as amended 19 U.S.C. §§ 1673-1677, are set forth in Appendix A, pp. 45-57.

## STATEMENT OF THE CASE

Plaintiff Western Concrete Structures Co., Inc. ("Western") twice attempted, and twice failed, in the District Court to convert charges that the defendants had "dumped" steel, in violation of the 1921 Antidumping Act, into actionable claims for damages under sections 1 and 2 of the Sherman Act and Section 73 of the Wilson Tariff Act.[1]

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[1] The jurisdictional bases in the District Court for these claims are section 4 of the Clayton Act, 15 U.S.C. § 15, and section 74 of the Wilson Tariff Act, 15 U.S.C. § 9.

In its Second Amended Complaint, Western alleged, in relevant part, that both it and defendant VSL Corporation ("VSL") engaged in post-tensioned concrete construction of bridges and commercial structures. (App. A, pp. 25-27, ¶¶ 6, 7, 10) It alleged further that the principal raw material used in post-tensioning is steel strand (App. A, p. 30, ¶ 25), and that VSL acquired its strand from Japan through a chain of distribution from defendant Shinko Wire Co., Ltd. ("Shinko"), the manufacturer, through defendant Mitsui Bussan Kabushiki Kaisha ("MBK"), an international trading company, and MBK's United States' subsidiary, defendant Mitsui & Co. (U.S.A.), Inc. ("Mitsui"). (App. A, pp. 28, 32, ¶¶ 16, 33)

Western alleged that defendants Shinko, MBK and Mitsui imported steel strand into the United States for sale to defendant VSL at prices below the level required by the 1921 Antidumping Act. (App. A, p. 32, ¶ 33) Western further alleged that the prices from defendants to VSL were legally "unavailable" to competitors of VSL, including Western, and were substantially lower than prices at which VSL's competitors could purchase steel. Western contended that this competitive advantage was used by VSL to submit lower bids on contracts for prestressed concrete, bids which Western claimed competitors of VSL could not meet. As a result, Western alleged that VSL obtained an increasing share of the post-tensioned concrete business, which between 1979 and 1983 allegedly ". . . was never less than 50% and reached 70% or more." (App. A, p. 38, ¶ 55)

Western did not allege that these international transactions established anything other than vertical sales relationships. It conceded that each sale in the chain was

above the seller's average total cost and, thus, was fully profitable to each defendant. (App. A, p. 3)

As a result of the purported competitive advantage on steel strand that VSL enjoyed, and its use of that advantage to price lower than its competitors, Western alleged that some prestressed concrete competitors exited the market during the relevant period. However, Western also expressly alleged that there was significant new competitive entry during the same period and that other firms besides VSL enjoyed market success. (App. A, p. 36, ¶ 47)

Relying on principles articulated by this Court and the Court of Appeals for the Third Circuit, the District Court held that Western's allegations of pricing above cost, but below a minimum established under the dumping laws, did not state a claim under either the Sherman Act or the Wilson Tariff Act. The Ninth Circuit, however, applying a novel theory of above-cost predation,[2] reversed and reinstated plaintiff's claims.

Because this case was resolved on the pleadings under Fed.R.Civ.P. 12(b)(6), it presents in its purest form the legal question of whether the Sherman Act may be used to attack a chain of profitable prices which results in a high quality, low cost product to the public. Left undisturbed the opinion below is likely to expand Sherman Act

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[2] The Ninth Circuit's theory was first enunciated in *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983). In *Transamerica*, the court held that such fully profitable pricing could nonetheless be deemed predatory under section 2 upon a "clear and convincing" showing that defendant intended "to discipline or eliminate competition" and enhance the firm's ability to monopolize in the long term. *Id.* at 1386. The petition for certiorari in the *Transamerica* decision did not address the propriety of the above-cost theory of predatory pricing.

litigation by inviting unsuccessful competitors to use the Act to attack any unfair or inequitable conduct that affords a rival a competitive advantage, without regard to whether the challenged conduct advances or retards the procompetitive policies underlying the antitrust laws.

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## REASONS FOR GRANTING THE WRIT

### I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE NINTH CIRCUIT'S HOLDING THAT PROCOMPETITIVE CONDUCT THAT IS "UNFAIR" OR "ILLEGAL" CAN BE A RESTRAINT OF COMPETITION VIOLATING SHERMAN ACT SECTION 1

In holding that Western's Second Amended Complaint states a claim for relief under section 1 of the Sherman Act, 15 U.S.C. § 1, the majority opinion below announces an unprecedented rule that conflicts with decisions of this Court and the Courts of Appeal for the Third and Seventh Circuits. (See Rule 17.1(a).) It ignores the procompetitive nature of the defendants' conduct and permits the Sherman Act to be used to enforce a patently anticompetitive, protectionist trade statute. If permitted to stand it will inhibit legitimate competition and frustrate the fundamental purpose of the Sherman Act to maximize consumers' interest in lower prices.

The admonition of Mr. Justice Rehnquist is especially appropriate here: "[w]e should always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition."[3]

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[3] *National Football League v. North American Soccer League*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from denial of certiorari, quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979)).

Accordingly, this Court, which has consistently sought to frame antitrust rules that advance the interests of consumers in lower prices and greater supplies and minimize the constraints on competitors from serving those interests, should grant the Writ to review and reverse the Ninth Circuit's decision.

### A. The Decision Below Decides an Important Question of Federal Antitrust Law in a Manner Contrary to Fundamental Principles Articulated by this Court and Is Likely to Have a Chilling Effect on Price Competition.

The Second Amended Complaint alleges that VSL and Mitsui engaged in purchase and sales transactions in steel strand at prices that "violated" the 1921 Antidumping Act and the Trigger Price Mechanism ("TPM") level set by the Treasury Department in 1978, 43 Fed.Reg. 1464 (1978). (App. A, p. 33, ¶ 35)

Western, however, expressly declined to plead that the low prices of which it complained were below any measure of cost.[4] Thus, the Ninth Circuit was faced with a section 1 claim predicated on vertical sales transactions at prices above cost but below the level established by a protectionist trade statute and related regulations.

The Ninth Circuit acknowledged that most price-cutting is procompetitive. Nonetheless, it concluded that the low priced but profitable agreements among petitioners constituted a restraint of trade on the theory that such

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[4] (Majority Opinion, App. A, p. 3) As discussed more fully below, this concession has great significance for the analysis under section 2 of the Sherman Act as it presents starkly the question whether above-cost pricing can ever be "predatory."

agreements were anticompetitive under the "peculiar market structure of the post-tensioning business" which it described as a "protected market." (App. A, p. 6)[5]

This theory is simply incorrect. The court failed to recognize that the market being protected by the antidumping laws was the U.S. steel industry, not the post-tensioning industry in which Western competes. Post-tensioning contractors, like all other consumers of steel products, were actually harmed by TPM because it increased the price of steel strand. Thus, petitioners' purchase and sale agreements that avoided the price "floor" imposed by TPM were procompetitive, not anticompetitive.

Indeed, it was the regulatory scheme that the petitioners allegedly sought to circumvent that was anticompetitive. Price fixing, whether by private conspiracy or government mandate, is inherently anticompetitive. As the

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[5] Contrary to the court's observation (App. A, p. 6) neither the Trigger Price Mechanism ("TPM") nor the Antidumping Act *prohibited* importation of steel strand below a fixed price. Thus there is no such thing as an "unlawful" price under either standard. TPM (which was abandoned in January 1982) functioned as a "monitoring system . . . for the Secretary of Treasury to initiate antidumping complaints and to expedite the Department's antidumping investigation." See Nolan-Haley, *The Trigger Price Mechanism: Protecting Competition or Competitors?* 13 NYU J. Int. L. & Pol. 1, 4 (1980). If sales below TPM triggered an antidumping investigation, the Antidumping Act merely provided an administrative mechanism that could lead to a finding that sales below fair value had materially injured a U.S. industry, threatened such injury or retarded the development of a U.S. industry. 19 U.S.C. § 1673. If dumping were found, the only result would be an assessment of an antidumping duty under the 1921 Act, *id.*, which is a tax, not a penalty. *C.J. Tower & Sons v. United States,* 71 F.2d 438 (C.C.P.A. 1934); *see Victor, Antidumping and Antitrust: Can the Inconsistencies Be Resolved?* 15 NYU J. Int. L. & Pol. 339 (1983).

Federal Trade Commission has stated, "[t]he unilateral imposition by the U.S. Treasury of a minimum price for steel imports effectively compels foreign steel producers to act as if they were a steel export cartel."[6] Although the decision below recognizes this by calling the post-tensioning business a "protected market" due to the alleged price minimums for steel strand, it failed to accept the consequences of this fact.

Petitioners' alleged conduct may circumvent the Antidumping Act or violate Customs reporting requirements. But it would turn the Sherman Act on its head to say, as the Ninth Circuit necessarily did, that an agreement to avoid the effects of a trade protectionist regulation is itself a restraint of trade. The court in effect has rewritten the Sherman Act to accommodate and enforce, rather than to confine, an anti-competitive statute.[7]

This Court rejected such an interpretation of the Sherman Act in *United States v. Citizens & Southern National*

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[6] Federal Trade Commission Staff Report on the United States Steel Industry and its International Rivals: Trends and Factors Determining International Competitiveness 560 (1977); *See also* Note, *Protecting Steel: Time for a New Approach*, 96 Harv. L. Rev. 866, 883 (1983) ("The International Trade Commission regarded TPM's 'inconsistency with the Sherman Act [to be] apparent' "), *quoting from*, Note, *Effective Enforcement of U.S. Antidumping Laws: The Development and Legal Implications of Trigger Pricing*, 10 Law & Pol'y Int'l Bus. 969, 996 (1978); Nolan-Haley, *supra* note 5, at 12-13 (1980) ("To the extent that it determines or controls prices at which imported steel mill products enter the domestic market, the TPM also is a species of price fixing, manipulation or stabilization"). *See also* Victor, *supra* note 5.

[7] This Court has consistently limited the impact of statutes which interfere with the procompetitive aims of the Sherman Act. *See, e.g., Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 73-74 (1953),

*Bank*, 422 U.S. 86 (1975), holding that conduct which circumvents protectionist statutes, even though harmful to other competitiors, does not violate the Sherman Act.[8] In *Citizens & Southern National Bank*, the bank and its holding company had been charged with conspiring to restrain competition in the Atlanta, Georgia banking market through *de facto* branching into suburban markets, contrary to the strict anti-branching laws of the State of Georgia. This Court found that defendants had engaged in procompetitive conduct by circumventing a protectionist barrier imposed by state banking laws and rejected plaintiff's Sherman Act claims against the bank. 422 U.S. at 118-20. This same principle should have guided the court below.

Recent decisions of this Court reaffirming the basic purposes of the antitrust laws to promote consumer welfare lead to the same conclusion. *See NCAA v. Board of Regents of the University of Oklahoma*, — U.S. —, 104 S. Ct. 2948 (1984); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).[9]

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[8] The majority opinion dismisses *Citizens & Southern National Bank* as "hardly relevant" (App. A, p. 8), but the procompetitive policy embodied in the holding of that case is compelling authority for a rule that circumvention of a protectionist statute is *not* a restraint of trade.

[9] "A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal (consumer welfare) of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *NCAA v. Board of Regents*, 104 S. Ct. at 2964. "As the legislative history shows, the Sherman

(Continued on following page)

The Ninth Circuit's decision below is utterly inconsistent with these principles. This Court should grant the Petition, apply these principles and reverse the decision below.

### B. The Ninth Circuit's Sherman Act Section 1 Decision Conflicts with Other Lower Court Authorities.

The dissent below accurately notes that the majority opinion transmutes section 1 into a "code of fair competition" which condemns "any unfair or unlawful scheme by which a seller seeks to improve his position in the market at the expense of his rivals." (App. A, p. 16) Recognizing the dangers in such a rule, the other courts that have faced the issue have uniformly adopted a more narrow and rational view. *See In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 105 S. Ct. 1863 (1985); *Knuth v. Erie-Crawford Dairy Cooperative Ass'n.*, 463 F.2d 470 (3d Cir. 1972); *cert. denied*, 410 U.S. 913 (1973); and *Sutliff, Inc. v. Donovan Companies*, 727 F.2d 648, 655 (7th Cir. 1984). Each of these circuit court decisions concludes that section 1 does not prohibit a pricing agreement which produces a competitive advantage to a defendant merely because that agreement includes conduct that may be characterized as unfair, illegal or tortious. The decision below cannot be

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Act was enacted to assure customers the benefits of price competition. . . ." *Associated General Contractors*, 459 U.S. at 538. "It is in the sound commercial interest of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system." *Reiter*, 442 U.S. at 342.

reconciled with these decisions and expands the Sherman Act in a way contrary to its economic purposes.

In the pivotal case of *In re Japanese Electronic Products Antitrust Litigation*, affirming in relevant part *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981), Japanese television manufacturers and American importers were sued by rival American television manufacturers. The district court granted defendants' motion for summary judgment on several grounds, including the very question present here—whether agreements between Japanese sellers and American buyers to avoid the Antidumping Act and to sell products in the United States at low prices violated the Sherman Act. The district court, relying upon this Court's decision in *Citizens & Southern National Bank*, 422 U.S. 86 (1975), held that such agreements are inherently procompetitive and cannot violate the Sherman Act.

The Third Circuit affirmed in relevant part, holding that one American buyer, Sears, although guilty of agreeing with its Japanese suppliers to purchase goods at prices which violated the antidumping laws and of defrauding the U.S. Customs Service, did not violate the Sherman Act by entering into such purchase and sale agreements.[10] *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 306-313. Sears was in the same position in that case as VSL here—it purchased imported products at low

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[10] Certiorari has been granted by the Supreme Court, 105 S. Ct. 1863 (1985). Although the specific issues presented by this Petition are not covered by this Court's grant of certiorari in *Zenith*, both cases involve domestic companies which attempt to use the Sherman Act to deter foreign concerns from lawful price competition.

prices which the plaintiff claimed violated the Antidumping Act so that it could enjoy a competitive advantage in the resale market. Thus the decision below squarely conflicts with the Third Circuit's *Japanese Products* decision.

The Ninth Circuit's attempt to distinguish *Japanese Products* on the ground that "the essence of the decision is that Sears was not a conspirator," (App. A, p. 7), misses the point. Although Sears was not a co-conspirator in either of two identified *horizontal* conspiracies in the case, Sears did "conspire" vertically with its suppliers to obtain an illegal price concession. The "conspiracy" claimed by Western is the same: VSL allegedly "conspired" to obtain a favorable, dumping price from its Japanese steel suppliers.

In *Knuth v. Erie-Crawford Dairy Cooperative Ass'n.*, it was alleged that defendant milk producers engaged in a scheme of providing secret rebates to dairies in order to sell milk at prices below those established by the Pennsylvania Milk Control Commission. While illegal under Pennsylvania law, the alleged rebates were held by the Third Circuit not to constitute a Sherman Act violation. As here, the operative conduct charged in the complaint was a contract between seller and buyer to purchase at an illegally low price. 463 F.2d at 475-76. The Third Circuit rejected the Sherman Act claim notwithstanding allegations of anticompetitive intent and of injury to plaintiffs and other competitors.

The decision below also conflicts with the decision of the Seventh Circuit in *Sutliff, Inc. v. Donovan Companies*. There, plaintiffs attempted to base an antitrust claim on allegations that defendants fraudulently induced one of the plaintiffs to sell them oil at a price below cost, which

they resold in competition with other plaintiffs at below-market prices. Plaintiffs alleged, *inter alia*, predatory pricing in the resale of oil purchased from Sutliff. The Seventh Circuit affirmed the district court's dismissal of the federal antitrust claims, holding that "unfair competition" does not state a violation of the Sherman Act.[11]

Thus, the Ninth Circuit's decision, interpreting the conduct alleged by Western to state a section 1 offense, conflicts with the Third Circuit's decisions in *Japanese Products* and *Knuth* and with the Seventh Circuit's decision in *Sutliff*. This Court should resolve the conflict by granting this Petition and determining whether "unfair" or "illegal" conduct which enables a purchaser to compete at a lower price than his competitors can constitute a Sherman Act section 1 offense.

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[11] The Court held:

> "The factual allegations in this complaint do not state an antitrust claim. From an antitrust standpoint it is as if the complaint alleged that the defendants were fences who brought [sic] oil at cut-rate prices from thieves and then resold it in competition with legitimate dealers at lower prices than those dealers could sell their oil. This would be a species of unfair competition, like stealing a competitor's trade secret or using false advertising to divert a competitor's customers to oneself; but none of these things are antitrust violations; unfair competition, as such, does not violate the antitrust laws." 727 F.2d at 655.

*See also, Hunt v. Crumboch*, 325 U.S. 821, 826 (1945) (the Sherman Act does not proscribe "all torts" which may harm a competitor); *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 447 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978) ("Conduct not within the scope of the [Sherman] Act is not made into an antitrust violation by accompanying conduct which is reprehensible under some moral or ethical standard or even illegal under some other law").

## II. CERTIORARI SHOULD BE GRANTED TO EXAMINE THE NINTH CIRCUIT'S MISCONCEIVED SHERMAN ACT SECTION 2 PREDATORY PRICING STANDARDS

The Ninth Circuit resurrected Western's Sherman Act section 2 claim by characterizing defendants' low price agreements as "illegal price-cutting" aimed at monopolizing the market. Applying, and in fact extending, a novel theory of "predatory" pricing it first fashioned in *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983),[12] the Court concluded that these price reductions could be considered anticompetitive even though clearly above average total cost. In effect, the Court has now ruled that conclusory allegations of monopolistic intent can transform otherwise competitive, profitable pricing into anticompetitive conduct sufficient to sustain a section 2 claim.

This result is only possible in the Ninth Circuit. No other Circuit which has addressed this issue allows profit-

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[12] Judge Sneed, who dissented from the majority's analysis of section 1, concurred in the ruling on Western's section 2 claim. His reasoning, however, is flawed. According to Judge Sneed, "The only difference between the conduct alleged in this case and ordinary predatory pricing is that here it is the law, rather than costs, that prevents the defendant's competitors from matching the defendant's price." (App. A, p. 15) However, a defendant could never hope to succeed in monopolizing through "illegal" price advantages, because the scheme would depend upon two extremely doubtful assumptions: (1) that the regulatory agency would not enforce the protectionist statute with respect to the defendant, since prosecution would presumably terminate the price advantage and preclude recoupment of the defendant's losses; and (2) that the agency would at the same time vigorously enforce the law against each of the defendant's competitors, since otherwise they would follow the defendant's lead and obtain the same advantage.

able, above-cost pricing, coupled only with allegations of monopolistic purpose, to constitute a section 2 claim. The reason is plain: price-cutting intended to maintain or gain customers, where price approaches cost, is activity which the Sherman Act fosters, not condemns. If allowed to stand, the Ninth Circuit's expansive standard will chill vigorous price competition and protect inefficient competitors at a substantial cost to the consuming public.

### A. The Ninth Circuit's Above-Cost Predatory Pricing Rule Should Be Abolished to Eliminate the Conflict with All Other Courts of Appeal.

The Ninth Circuit's holding stands in sharp opposition to the law of every other Court of Appeals which has decided whether above-cost pricing can be "predatory." The First, Sixth, and Seventh Circuits have explicitly ruled that profitable pricing must be deemed *per se* legal. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983); *Arthur S. Langenderfer, Inc. v. S E. Johnson Co.*, 729 F.2d 1050, 1058 (6th Cir.), *cert. denied*, 105 S. Ct. 510 (1984); *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1114 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983).

The Federal Trade Commission has made precisely the same determination. *In the Matter of International Telephone & Telegraph Corp. and ITT Continental Baking Co.*, 47 Antitrust & Trade Reg. Rep. (BNA) 283, 286 (FTC 1984).[13]

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[13] *Cf. also Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 740 F.2d 980, 1007 n. 37 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1359 (1985). Of the Circuits

(Continued on following page)

While the Fifth Circuit has ruled that above-cost pricing may be considered "predatory" in narrow circumstances, it does so in a manner significantly more restrictive than the Ninth Circuit rule. *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724-725 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 891 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 910 (1985).[14]

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which have not yet reached the specific issue of above-cost pricing, all except the Fourth have nonetheless established below-cost tests to analyze whether a price is predatory. *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 349-50 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) and *Indian Coffee Corp. v. Procter and Gamble Co.*, 752 F.2d 891, 902 (3d Cir. 1985); *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *Pacific Engineering and Production Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

The last decision of this Court to discuss predatory pricing indicated that anti-competitive intent could be inferred from "persistent unprofitable sales *below* cost. . . ." *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696 n. 12 (1967) (emphasis added).

[14] Under the *International Air Industries* rule, a plaintiff must plead below-cost pricing to state a prima facie predatory pricing claim unless he can additionally demonstrate (1) that the alleged predator had also engaged in price discrimination; (2) that the price discrimination had a substantially detrimental effect on the competitive market; and (3) that the alleged predator's market had "extremely high" barriers to entry. *Internat-*

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Thus, the Ninth Circuit stands alone in its approach to above-cost predatory pricing under section 2 of the Sherman Act. Western's section 2 claim clearly would not have survived a Rule 12(b)(6) motion in the First, Fifth, Sixth or Seventh Circuits, and likely would not have survived in any other Court of Appeals. This Court should resolve this conflict and decide whether, as a matter of law, profitable above-cost pricing can support a claim of predatory pricing under section 2.

### B. The Ninth Circuit's Above-Cost Predatory Pricing Rule Should Be Abolished Because It Thwarts the Procompetitive Purposes of the Sherman Act.

There is good reason why no other Circuit has adopted the Ninth Circuit's above-cost "predatory" pricing theory, and why three Courts of Appeal have rejected it outright: it thwarts the procompetitive purposes of the Sherman Act and inflicts enormous costs upon society for the sake of deterring a phenomenon which may not even exist. The mischief of this theory is amply demonstrated by its use in this case to enforce a protectionist dumping statute.

#### 1. The Rule Bars Procompetitive Price Reductions.

The Ninth Circuit's theory that above-cost pricing can be predatory is premised on the fear that a market's dominant firm might exclude rivals by setting prices above its

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*ional Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d at 724-25. The *Transamerica* rule places no such specific pleading requirements upon the plaintiff. *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d at 1388.

average total costs but below the level of maximum profit. Competitiors who could not profitably meet this "limit price" would face an indefinite period of losses and would thus exit the market; potential competitors would be deterred from entry.[15] Professors Areeda and Turner observe, however, that:

> [e]xclusion by charging prices equal to average cost is . . . competition on the merits—only those potential entrants who cannot survive at the efficiency-related price are kept out. [N. 24] Similarly, only less efficient existing rivals will be eliminated by the monopolist's limit price.[16]

The withdrawal or deterrence of less efficient producers is, in fact, an inevitable aspect of the vigorous competition which section 2 intends to foster. As the Ninth Circuit itself stated in *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978), "it is the very nature of competition that the vigorous, efficient firm will drive out less efficient firms." Above-cost "limit" pricing, by rewarding the most efficient competitor with market control, thus furthers the purposes of the Sherman Act by inducing lower prices, higher output, and fuller utilization of society's productive resources.[17]

By barring such pricing, the Ninth Circuit states an antitrust rule that disserves the objectives of antitrust policy while providing consumers with fewer goods at a higher price. This is bad law. As the Sixth Circuit notes,

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15 *Transamerica*, 698 F.2d at 1387.

16 Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 706 and n.24 (1975).

17 3 P. Areeda & D. Turner, *Antitrust Law* 160 (1978).

> Any definition of predatory pricing . . . must . . . accommodate the economic policies of the antitrust laws to promote efficiency, encourage vigorous competition and maximize consumer welfare. . . . [Rules prohibiting above-cost predatory pricing] would work contrary to these goals by forcing a larger, more efficient firm to maintain artificially high prices to the detriment of the public.

*Langenderfer,* 729 F.2d at 1057. *See also MCI Communications,* 708 F.2d at 1114; *Barry Wright,* 724 F.2d at 231, 235; *Northeastern Telephone,* 651 F.2d at 87; and *Kerr-McGee,* 551 F.2d at 796.

The apparent rationale for tolerating these immediate anticompetitive effects is to preserve the possibility that additional competitors, over the long run, might eventually force prices lower than the dominant firm's current limit price.[18] However, "antitrust laws very rarely reject such beneficial 'birds in hand' for the sake of more speculative (future low-price) 'birds in the bush.'" *Barry Wright,* 724 F.2d at 234. Professors Areeda and Turner state the proposition succinctly: "It makes no legal sense to compel a monopolist to invite entry by exploiting consumers. . . ."[19]

**2. The Rule Chills Non-Predatory Price Competition.**

Price reductions to a level at or above average total cost, even when intended to drive out less efficient rivals and to discourage potential entrants, better serves the purposes of the Sherman Act than pricing at sufficiently high levels to attract inefficient producers. The rule ap-

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[18] Areeda & Turner, *supra* n.17, at 160.

[19] *Id.* at 161 n.7.

plied by the Ninth Circuit below not only specifically bars such price cuts but also chills clearly beneficial, non-predatory price cuts.

In *Transamerica*, the Ninth Circuit acknowledged that predatory pricing "would be difficult to detect in situations where price exceeds average total cost." *Transamerica*, 698 F.2d at 1388. The First Circuit agrees. In *Barry Wright*, it observed that, as a practical matter, it is "most difficult to distinguish in any particular case between a firm that is cutting price to 'discipline' or to displace a rival and one cutting price 'better to compete.'" 724 F.2d at 234. *See also Northeastern Telephone*, 651 F.2d at 88. Unless courts can consistently differentiate between the two, competitors will "avoid legitimate pricing strategies out of fear of prosecution or litigation."[20] In the words of the Second Circuit, "inadvertently condemning such [vigorous price] competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote." *Northeastern Telephone*, 651 F.2d at 88. *See also Barry Wright*, 724 F.2d at 235.

Because it rests on an array of unadministrable inquiries, the *Transamerica* rule inevitably runs the risk of regularly condemning legitimate price competition.[21] This is an unacceptably high price to pay.

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[20] Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 Cornell L. Rev. 738, 790 (1981).

[21] Given the extraordinary complexity of the standard employed under the *Transamerica* rule to differentiate predation from competition, the chilling of non-predatory price reductions is unavoidable. *Transamerica's* threshold inquiry is whether the allegedly "predatory" price fell below the level of the seller's short-run profit maximization. This determination "hinges not only on cost data, but also on elasticity of demand,

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> [U]nlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries and courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic end they seek to serve. . . . We must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition. Indeed, it is this risk that convinces us not to follow the Ninth Circuit's approach.

*Barry Wright*, 724 F.2d at 234.

In fact, the above-cost "predatory" phenomenon which the Ninth Circuit seeks to deter with its costly and un-

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competitors' responses to price shifts, and changes in unit costs with variations in production volume." *Barry Wright*, 724 F.2d at 235; *MCI Communications*, 708 F.2d at 1114. Consideration of this web of complexities is immediately followed by inquiry into such factors "as intent, market power, market structure, and long-run behavior," *Transamerica*, 698 F.2d at 1387, as well as the relationship of excess capacity to declining demand, the correlation of price shifts to the entry and exit of competitors, and the cost justification of any price increase. Hovenkamp, *Predatory Pricing and the Ninth Circuit*, 1983 Ariz. St. L. J. 443, 476 (1983). No more complex cases could be conceived.

Commentators have recognized the implausibility of effectively evaluating such factors in a judicial setting. *See, e.g.*, Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L. J. 213, 255 (1979); R. Bork, *The Antitrust Paradox: A Policy at War With Itself* 155 (1978); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 289-96 (1981); McGee, *Predatory Pricing Revisited*, 23 J. L. & Econ. 289, 292-93 (1980); Brodley & Hay, *supra* note 20, at 770; P. Areeda, *Antitrust Law* 133, 138-39 (Supp. 1982); Areeda & Turner, *supra* note 17, at 162; Areeda, *Predatory Pricing*, 49 Antitrust L. J. 897, 898-99 (1980).

workable rule is at best a rarity—as the *Transamerica* court itself concedes[22]—and quite likely a fiction.[23] The abstract risk of such conduct cannot justify the severe burden on price competition and on judicial administration inflicted by the rule.[24]

This Court should grant certiorari to make the standards of a section 2 claim uniform throughout the federal judiciary and consistent with the procompetitive and efficiency goals of the Sherman Act.

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[22] 698 F.2d at 1388. Indeed, no reported case has ever found a section 2 violation based on above-cost predatory pricing. *See also* Areeda, *supra* note 21, at 118.

[23] The Federal Trade Commission recently conducted a sophisticated research project which modelled the various economic and behavorial features considered most favorable to predatory pricing, including above-cost predation. R. Isaac & V. Smith, *Experiments Concerning Antitrust Issues: Sunk Costs & Entry, and Predatory Behavior—A Consultants' Report to the Federal Trade Commission* 44 (1985). The researchers failed to generate a single instance in which above-cost predatory pricing would occur. *See also* McGee, *supra* note 21, at 321 ("logic and history make trouble for limit-pricing theories"); Bork, *supra* note 21, at 154 (predatory pricing "probably does not exist").

[24] For these reasons, Professors Areeda and Turner, Zerbe, Posner, and McGee advocate *per se* legality for prices above average total cost. Areeda and Turner, *supra* note 17, at 153; Zerbe & Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 Tex. L. Rev. 655, 715 (1982); Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. Chi. L. Rev. 506, 518-19 (1974); McGee, *supra* note 21, at 326. Judges Easterbrook and Bork have both advocated *per se* legality for all pricing, above or below cost. Easterbrook, *supra* note 21, at 337, and Bork, *supra* note 21, at 154. Professor Williamson advocates *per se* legality for above-cost pricing in all claims between existing rivals—such as the instant case presents. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L. J. 284, 333-37 (1977).

## III. THE NINTH CIRCUIT'S DECISION WILL TRANSFORM THE SHERMAN ACT INTO A CODE OF FAIR, RATHER THAN VIGOROUS, COMPETITION

By reinstating Western's Sherman Act claims, the Ninth Circuit created a new Sherman Act cause of action for pricing at levels "legally unavailable" to one's competitors. The Ninth Circuit held that the defendants' alleged violations of the protectionist dumping law, coupled merely with boiler-plate allegations of predatory intent, sufficed for a predation claim under both section 1 and section 2 of the Sherman Act. Such a holding condemns as "anticompetitive" price cuts which maximize a defendant's profits while providing the consumer with more goods at lower prices, simply because they violate a statute which patently impedes, rather than improves, price competition. As the dissent below recognized, this turns section 1 into a "code of fair competition" with "far reaching" implications.[25]

The decision below does similar injustice to section 2. It permits a predatory pricing claim where the defendant's price is lower than its competitors' prices and optimally profitable to itself, simply because the defendant allegedly violated a law which is enforceable by other means.

By permitting plaintiff's claims, the Ninth Circuit encourages high-priced domestic companies to use the

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[25] Judge Sneed observes that under the majority's analysis, conduct violating standards as extraneous to competition policy as minimum wage laws and criminal statutes might be transformed into antitrust violations (App. A, pp. 16-17). This is no hyperbole. Only slight imagination and a modest recognition of the allure of treble damages is necessary to recognize the profound effect that the Ninth Circuit's decision will have on the courts.

Sherman Act to enforce a trade statute whose purpose and effect is to protect competitors, not competition. This Court should grant the Petition to review the Ninth Circuit's ill-advised and unprecedented extension of the Sherman Act.

Respectfully submitted,

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Date: August 15, 1985

No. 84-

In The

# Supreme Court of the United States

October Term, 1984

Mitsui & Company (U.S.A.), Inc.; Mitsui Bussan Kabushiki Kaisha; VSL Corporation, Inc.; Shinko Wire Co., Ltd. and Losinger AG,

*Petitioners,*

v.

Western Concrete Structures Co., Inc.,

*Respondent.*

## APPENDIX A TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT


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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-2464
(D.C. No. C-82-6628-MHP)

WESTERN CONCRETE STRUCTURES CO., INC.,

Plaintiff-Appellant,

vs.

MITSUI & COMPANY (U.S.A.), INC., MITSUI BUSSAN KABUSHIKI KAISHA, VSL CORPORATION, INC., SHINKO WIRE CO., LTD., and LOSINGER AG,

Defendants-Appellees.

OPINION
(Filed May 17, 1985)

Appeal from the United States District Court
for the Northern District of California
Honorable Marilyn Hall Patel, District Judge, Presiding
Argued and Submitted August 8, 1984—
San Francisco, California

Before: BROWNING, Chief Judge, DUNIWAY and SNEED, Circuit Judges

DUNIWAY, Circuit Judge:

Western Concrete Structures alleged in its second amended complaint that the defendants conspired to import steel strand from Japan at prices below the lawful price, so that VSL could underbid its competitors in this country, including Western, in the post-tensioning concrete industry. The district court entered a judgment dismissing all of Western's claims. We reverse in part and affirm in part.

## I. *Facts.*

In reviewing the district court's dismissal for failure to state a claim, we must treat the facts alleged in the complaint as true. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 9 Cir., 1983, 712 F.2d 404, 406. The complaint's allegations are these:

Post-tensioning is a construction process used in building bridges, nuclear reactors, and other concrete structures, that involves the stretching of steel strand tendons within concrete slabs or girders. The cost of steel strand is approximately 55% of the direct cost of post-tensioning, while the profit margin is approximately 8%. Thus, the price of steel strand significantly affects a post-tensioning firm's competitive bidding position.

Plaintiff Western Concrete Structures and defendant VSL are California corporations that compete in the post tensioning business. VSL is a subsidiary of defendant Losinger, a Swiss firm. Defendants Mitsui (Japan), a Japanese trading company, and its American subsidiary Mitsui (U.S.A.) supply VSL with steel strand manufactured in Japan by defendant Shinko Wire.

In early 1978, the United States Department of the Treasury implemented import restrictions for steel mill products, including steel strand. The restrictions established published trigger prices, based on the production costs of the most efficient domestic manufacturers, below which importation could trigger government action under the Antidumping Act of 1921, 19 U.S.C. § 160 *et seq.*, *as amended id.* § 1673 *et seq.* In 1982, VSL and Mitsui (U.S.A.) were indicted for, and pleaded guilty to, import-

ing steel strand at prices below trigger prices, in violation of the Antidumping Act.

Western's action is for treble damages under the Sherman Act, 15 U.S.C. §§ 1 and 2 and § 4 of the Clayton Act, *id.* § 15(a), under the Wilson Tariff Act, *id.* § 8, under the Antidumping Act of 1916, *id.* § 72 ¶ 3, and state law against unfair competition. Western alleges that the defendants conspired to import steel strand into the United States at prices below those permitted by the import restrictions, with the intent of restraining competition in the post-tensioning industry and thus helping VSL to attempt to monopolize that industry. However, Western expressly disclaimed that it alleges or claims "predatory" pricing by the defendants, that is, pricing below the seller's marginal or average variable or average total cost. *See Transamerica Computer Co. v. IBM Corp.*, 9 Cir., 1983, 698 F.2d 1377, 1384-88; *Zoslaw v. MCA Distributing Corp.*, 9 Cir., 1982, 683 F.2d 870, 887-88. The key allegation is that the conspiracy enabled VSL to obtain steel strand at prices 15% to 20% lower than the price at which VSL's competitors, including Western, could legally purchase steel strand from Mitsui, from other importers, or from domestic suppliers. VSL consequently increased its market share to about 70%. VSL's ability to underbid forced four out of five of its "substantial" competitors in the bridge post-tensioning business out of the market, and forced all three existing "substantial" commercial post-tensioning competitors out of the market. Western's share of the post-tensioning bridge market dropped from 13% to 5%, and its share of the commercial post-tensioning business dropped from about 15% to 4% in a year, and Western then left that market.

In considering appellant's claims, we bear in mind that the judgment was based on a determination under Rule 12(b)(6) F.R. Civ. P that the complaint does not "state a claim upon which relief can be granted." No answer has been filed; no discovery has occurred; no trial has taken place. Only if it is clear that a viable claim cannot be stated should a judgment of dismissal be entered on a Rule 12(b)(6) motion.

II. *Sherman Act: Restraint of Trade and Monopolization.*

The district court ruled that Western failed to state a claim under the Sherman Antitrust Act and the Clayton Act, 15 U.S.C. §§ 1, 2, and 15, because it did not allege facts amounting to anticompetitive conduct or antitrust injury. The court held that the alleged purchase and sale agreements for steel strand at below the Trigger Price Mechanism level and in violation of the Antidumping Acts were not, without more, anticompetitive or predatory within the meaning of 15 U.S.C. §§ 1 and 2. Western argues that the intent and purpose of the defendants' conspiracy to violate the import price controls was to suppress and restrain competition, a violation of § 1, and to help VSL to monopolize the post-tensioning industry, a violation of § 2. Western alleges that the defendants' conduct caused injury to competition because the competitors of VSL could not meet VSL's bid price or negotiated price for post-tensioned projects, and consequently were driven out of the market.

Whether the alleged acts were anticompetitive and predatory within the meaning of the antitrust laws is a

question of law that we review *de novo*. *Foremost Pro Color v. Eastman Kodak Co.*, 9 Cir., 1983, 703 F.2d 534, 539. We note, too, that summary dismissals of antitrust actions are disfavored. *Clayco Petroleum, supra*, 712 F.2d at 406.

Many decisions speak of "the anti-trust laws" or "the Sherman Act" without distinguishing between section 1 and section 2 of that Act. However, there is a difference, and in this case that difference may be material. We therefore consider the two sections separately.

A. *Section 1 of the Sherman Act.*

Section 1 prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . . ." Thus the first thing that the pleader must allege is that there is a "contract, combination . . . or conspiracy." The complaint does allege such a conspiracy.

The second requirement is that the conspiracy must be "in restraint of trade or commerce." That, too, is alleged. However, defendants argue, and the trial judge agreed, that price cutting does not violate section 1, unless it is "predatory" in the sense that it is below cost. Our cases say that this is usually, but not always correct. There are exceptions. See our discussion of this phase of the law in *Transamerica Computer Co., Inc., v. IBM Corp.*, 9 Cir., 1983, 698 F.2d 1377, 1387. "First, this court has already recognized that prices exceeding average total cost might nevertheless be predatory in some circumstances." And again: "A rule based exclusively on cost

forecloses consideration of other important factors, such as intent, market power, market structure, and long-run behavior in evaluating the predatory impact of a pricing decision."

Here, intent to injure VSL's competitors and to drive them out of the market is specifically alleged. Also alleged is the peculiar market structure of the post-tensioning business. It is a protected market, in that steel strand may not lawfully be imported at prices below a fixed price. Domestic concerns cannot lawfully buy imported steel strand below that price and domestic sellers will not sell steel strand below that price. It is alleged that the conspirators arranged to supply VSL with imported steel strand at a price below what VSL's competitors could lawfully pay and that the intended and actual result was to enable VSL to put those competitors, including Western, at a competitive disadvantage, and drive most of them out of the post-tensioning business, including Western as to one part of the market. We hold that these allegations being [sic] this case within the exception that we articulated in *Transamerica Computer*. Here, the price cutting was not "pro-competitive" as most price cutting is. Rather, it was intended to be, and was, anticompetitive under the unique conditions of the relevant market.

The cases on which the appellees relied are not to the contrary. The first is *In re Japanese Electronic Products Antitrust Litigation*, 3 Cir., 1983, 723 F.2d 238, affirming in part *Zenith Radio Corp. v. Matsushita Electric Industries Co.*, E.D. Pa., 1981, 513 F. Supp. 1100. Defendants rely on a ruling in favor of Sears, one of the defendants. Here is what the court said:

> There is evidence from which it could be found that Sears negotiated prices from Sanyo and Toshiba substantially lower than the minimum prices fixed in the MITI-sponsored minimum price agreement, and took steps, over a long period, to conceal these dumping prices from the Japanese government and the United States Customs Service. While that activity, if it occurred, may have been illegal, it was clearly consistent with Sears' economic interest as a retailer. There is no evidence that Sears was aware of retail price stabilization in Japan, or of the five-company rule, or that the suppliers with which it dealt were acting in concert with respect to the evasion of the minimum prices agreed upon with MITI.

723 F.2d at 312.

As the last sentence shows, the essence of the decision is that Sears was not a conspirator.

It is true that elsewhere in the *Japanese Electronic* opinion there is language that selling in this country at prices below the prices which the Japanese companies charged in Japan does not violate section 1 of the Sherman Act, 723 F.2d at 305. But there is more here. In the same opinion, 723 F.2d at 311, the court said: "We hold that a finding of a conspiracy to sell at artificially high prices in Japan while at the same time selling at artificially low prices in the United States would support liability to NUE and Zenith under section 4 of the Clayton Act, . . ."

The second case relied on by the appellees is *Knuth v. Erie-Crawford Dairy Cooperative Association,* 3 Cir., 1972, 463 F.2d 470. In that case, however, the court determined that the charged conspiracy had not been proved.

> Plaintiff argues that the conscious parallel action among all of the defendants was sufficiently inferable

> from the evidence that the existence of a conspiracy was a jury question. No specific evidence is referred to, and our own review of the record discloses no evidence tending to show that any handler was even aware of the price arrangement of any other. Evidence from which a conspiracy may be inferred is simply absent.

*Id.* at 476.

The third case is *United States v. Citizens & Southern National Bank*, 1975, 422 U.S. 86. The facts there are so different from the facts here that the case is hardly relevant. Moreover, it was not a pleading case. The court did not suggest, much less say, that a conspiracy to circumvent anti-competitive government restrictions, to the damage of competitors, can never be a violation of Section 1 of the Sherman Act.

We hold that the complaint alleges a sufficient claim under Section 1.

B. *Section 2 of the Sherman Act.*

Section 2 provides, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . .

Under this section, whether or not conspiracy is charged, there must be a specific objective—to "monopolize, or attempt to monopolize." This differs from section 1, which requires a conspiracy, but does not require monopolizing or attempting to monopolize. In this case the charge is that the defendants conspired to enable VSL to

monopolize the post-tensioning business in this country. The means used were to reduce the price of steel strand to VSL, and thereby VSL's price for post-tensioning, to a point where Western and other competitors of VSL are driven from the market. Both an attempt to do so and actually doing so are charged.

Attempt to monopolize and actual monopolization involve, among other things, intentional predatory or anticompetitive conduct. *See Northrop Corp. v. McDonnell Douglas Corp.*, 9 Cir., 1983, 705 F.2d 1030, 1057-58. This element of a section 2 claim encompasses more than the parallel element of a section 1 claim. *Calculators Hawaii, Inc. v. Brandt, Inc.*, 9 Cir., 1983, 724 F.2d 1332, 1339; *California Computer Products, Inc. v. IBM Corp.*, 9 Cir., 1979, 613 F.2d 727, 737. Conduct that is competitive in a section 1 context may be predatory or anticompetitive in a section 2 context, because monopolization is, in effect, being so competitive as to destroy competition. Thus, while illegal price-cutting is usually not a restraint of trade when done for competitive purposes in a competitive market, it is predatory if the purpose is to monopolize the relevant market. *See United States v. Columbia Steel Co.*, 1948, 334 U.S. 495, 531-32 ("even though the restraint effected may be reasonable under § 1, it may constitute an attempt to monopolize forbidden by § 2 if a specific intent to monopolize may be shown").

The cases cited by defendants in support of their argument that illegal price-cutting is not anticompetitive conduct under section 1 did not involve allegations comparable to Western's claim that the purpose of the dumping was to allow VSL to monopolize the American post-

tensioning industry. Thus, they do not support an argument that such conduct is not predatory or anticompetitive under section 2.

Western alleged that VSL violated the import restrictions in order to, and that it did, underbid its post-tensioning competitors, harm those competitors, and enhance its long-term position in the market. Western alleged that the conspiracy resulted in VSL increasing its market share to 70% or more, while correspondingly decreasing the market shares of its rivals, and that several firms were forced out of the market. Western alleged that the defendants intended to create a monopoly by means of other than fair competition, specifically by importing steel strand at illegally low prices. This would be predatory conduct. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 9 Cir., 1981, 668 F.2d 1014, 1030-31, ("Such conduct is not true competition. . . . Its purpose is to create a monopoly by means other than fair competition").

Western's allegation that the defendants agreed that Mitsui (U.S.A.) would sell Shinko Wire's steel strand to VSL at a price substantially lower than it offered to Western and other post-tensioning competitors, for the purpose of enabling VSL to monopolize the post-tensioning industry, if borne out, would establish a violation of § 2. Therefore, it is sufficient to survive a motion to dismiss.

We also conclude that the alleged illegal conduct resulted in antitrust injury. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 1977, 429 U.S. 477, 489. Western alleged that the defendants' conspiracy was intended to and did injure the post-tensioning market, in which Western competed, by creating a monopoly. Thus, Western's injury

was "inextricably intertwined" with the injury to the market that the conspiracy sought to inflict. *See Associated General Contractors v. California State Council of Carpenters*, 1983, 459 U.S. 519, 538; *Blue Shield of Virginia v. McCready*, 1982, 457 U.S. 465, 483-84.

III. *The Wilson Tariff Act.*

Western alleged as a separate claim that the defendants' conduct also violated the Wilson Tariff Act, 15 U.S.C. § 8. That Act prohibits

> Every combination, conspiracy, trust, agreement or contract . . . between two or more persons or corporations, either of whom . . . is engaged in importing any article from any foreign country . . . when such combination [etc.] . . . is intended to operate in restraint of . . . trade or . . . competition in . . . trade or commerce or to increase the market price . . . in . . . the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter.

The described conduct is analogous to that proscribed in § 1. *See Zenith Radio*, 513 F. Supp. at 1164, *aff'd* 723 F.2d at 306, 316; *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 9 Cir., 1976, 549 F.2d 597, 600 n.1. However, it does not, on its face, include monopolizing or attempting to monopolize. The complaint does state a claim under § 8, for the same reasons that it states a claim under § 1.

IV. *The 1916 Antidumping Act.*

The district court dismissed Western's action for violation of the 1916 Antidumping Act, 15 U.S.C. § 72, holding

that Western lacked standing to sue under that statute. The court found that the history of the Act suggested that although a direct domestic competitor of an alleged dumper (such as a domestic steel strand producer) might have a private right of action, a competitor of a purchaser from the alleged dumper (such as Western) does not.

Western argues that the language of the Act plainly confers standing:

> *Any person injured* in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court . . . and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

15 U.S.C. § 72 (emphasis added). The few cases that have addressed the extent of standing, however, demonstrate that the meaning of the language is not plain. *Compare Jewel Foliage Co. v. Uniflora Overseas Florida, Inc.*, M.D. Fla., 1980, 497 F. Supp. 513, 516-17 (importer has standing to sue a competing importer; standing not limited to domestic manufacturers), *with Schwimmer v. Sony Corp. of America*, E.D.N.Y., 1979, 471 F. Supp. 793, 797 (domestic wholesale distributor of imported products lacks standing; standing limited to domestic manufacturers injured by alleged dumping); *accord Bywater v. Matsushita Electric Industrial Co.*, S.D.N.Y., 1971, CCH Trade Reg. Rep. ¶ 73,759.

We must construe the grant of standing to "any person injured" not only in the light of its literal expansiveness and its meaning in the context of other statutes, such as the Clayton Act, 15 U.S.C. § 15, but in its specific context. The 1916 Act prohibits import or sale at below mar-

ket prices "with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States or of restraining or monopolizing any part of trade and commerce in such articles in the United States." 15 U.S.C. § 72. Thus, the express purpose of the Act is to protect domestic industries from dumping by their foreign competitors. In every reported case, the statute has been applied or restricted to domestic producers (or importers, in *Jewel Foliage, supra,* where there were no domestic producers of wide-leaf comador foliage) *of the dumped good,* prohibiting restraint or monopolization of trade *in the dumped good.* This is faithful to the historical purpose of the 1916 Act to protect American producers from foreign competitors, specifically established European manufacturers. *See Jewel Foliage,* 497 F. Supp. at 516-17; *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* E.D. Pa., 1980, 494 F. Supp. 1190, 1221; *Schwimmer,* 471 F. Supp. at 797; H.R. Rep. No. 922, 64th Cong., 1st Sess. 9-10 (1916).

Here, the claim is that defendants evaded the trigger price mechanism that protected the domestic steel industry. But Western is a member of the post-tensioning industry, not of the steel industry, and Western alleged that the defendants conspired to restrain and monopolize post-tensioning, not trade in steel strand. Violation by import and sale of steel strand at below market prices of anti-dumping laws intended to promote the domestic steel industry does not give rise to an action under the 1916 Anti-dumping Act by a member of the post-tensioning industry. We therefore conclude that the district court properly limited standing under the 1916 Act to domestic com-

petitors of the alleged dumper, denying standing to a domestic competitor of a domestic buyer of allegedly dumped goods.

V. *Conclusion.*

We affirm the judgment as it relates to the 1916 Antidumping Act.

We reverse the judgment as it relates to Sections 1 and 2 of the Sherman Act and the Clayton Act, and as it relates to the Wilson Tariff Act.

Affirmed in part, reversed in part, and remanded, plaintiff to recover its costs.

SNEED, Circuit Judge, Concurring in Part and Dissenting in Part:

I concur in the opinion of the court in all respects except that part, II.A, which holds that a violation of Section 1 of the Sherman Act has been alleged.

Section 1 of the Sherman Act forbids every "contract, combination . . ., or conspiracy, in restraint of trade or commerce." I agree that the complaint alleges a conspiracy. I do not believe, however, that the alleged conspiracy was "in restraint of trade or commerce." The majority reasons that the required element of restraint existed because the alleged object of the conspiracy was to drive VSL's competitors, including Western, out of business. I believe that such a motive renders the alleged conduct a conspiracy to monopolize or an attempt to monopolize within the meaning of Section 2 of the Sherman Act, but not a restraint of trade within the meaning of Section 1.

The improper conduct alleged in this case is a conspiracy to sell at prices below those that other competitors, acting within the law, could offer. This is no more and no less than a form of predatory pricing. The only difference between the conduct alleged in this case and ordinary predatory pricing is that here it is the law, rather than costs, that prevents the defendant's competitors from matching the defendant's price.

Our cases have always treated predatory pricing as a violation of Section 2, not Section 1. *See, e.g., RFD Publications, Inc. v. Oregonian Publishing Co.*, 749 F.2d 1327 (9th Cir. 1984); *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377 (9th Cir. 1983); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 739-43 (9th Cir. 1979); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977). I have found no case in this circuit that has extended Section 1 coverage to a conspiracy to engage in predatory pricing. One case from the Third Circuit, *In re Japanese Electronic Prods. Antitrust Litigation*, 723 F.2d 238 (1983), concerned a conspiracy to fix prices in one market while selling products at unlawfully low prices in another market. The court found that one defendant, Sears, had conspired with its supplier to import products at unlawfully low prices, but had not been part of the price-fixing conspiracy. Sears was held not to have violated Section 1. *See id.* at 312-13.

This paucity of authority should caution us not to leap to the conclusion that a Section 1 violation has been alleged in this case. Ordinarily, an arrangement between a

seller and his supplier designed to improve the seller's position in his market is not a violation of the Sherman Act. The purpose of competition from the merchant's point of view is to expand his market without regard to whether he thereby shrinks that of another merchant. The Sherman Act was designed to foster precisely that kind of activity.

The activity becomes a matter of concern under the Sherman Act only when the seller threatens to monopolize his market. Thus, Section 2 provides an appropriate test of the lawfulness of the conduct alleged. The analysis under Section 2 is straightforward, unstrained, and easy to grasp.

The majority's intent in declaring such an arrangement to be a "restraint of trade" under Section 1 is unclear. If the arrangement is unlawful under Section 1 only when it threatens to monopolize the market, then Section 1 is simply redundant of Section 2 in this context. If, however, Section 1 is applicable even when the arrangement does not threaten to result in monopoly, then Section 1 becomes a "code of fair competition" that brings under the antitrust laws any unfair or unlawful scheme by which a seller seeks to improve his position in the market at the expense of his rivals.[1] Antitrust law has always had a tendency to drift in this direction, but it is a drift to which I do not wish to add my weight.

The breadth of the majority's interpretation of Section 1 could be far-reaching. For example, a business linked in some advantageous way with organized crime might well be an antitrust target by its competitors. Or a supplier's violation of the minimum wage laws, when

known to his purchaser, might render the latter subject to an antitrust suit by a competitor. Or a knowing purchaser from one who is violating the antitrust laws might also be liable under Section 1. Perhaps the majority intend to reach this far. Perhaps not. Not knowing whether they do or not, I respectfully dissent from Part II.A.

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1. True, the plaintiff must allege a conspiracy of some sort, but we know from our experience in the criminal law that such an allegation is easily made and proven.

ORDERS OF THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C 82-6628 MHP

WESTERN CONCRETE STRUCTURES CO., INC., a California corporation; ALLAN H. STUBBS, an individual,

Plaintiffs,

vs.

MITSUI & COMPANY (U.S.A.), INC., a New York corporation, MITSUI BUSSAN KABUSHIKI, a foreign corporation; VSL CORPORATION, INC., a California

corporation; SHINKO WIRE CO., LTD., a foreign corporation; LOZINGER AG, a foreign corporation,

Defendants.

ORDER GRANTING MOTION TO DISMISS

(Filed April 27, 1983)

The motion of defendants VSL Corporation and Mitsui & Company (U.S.A.), Inc. to dismiss plaintiffs' Amended Complaint came on regularly for hearing at 10:30 a.m., April 18, 1983, plaintiff appearing by Spensley, Horn, Jubas & Lubitz, W. Robert Spensley and Vincent J. Belusko, defendant VSL Corporation appearing by Kadison, Pfaelzer, Woodard, Quinn & Rossi, Robert C. Bonner and Michael C. Kelley, and defendant Mitsui & Company (U.S.A.), Inc. appearing by McCutchen, Doyle Brown & Enersen, James L. Hunt and Gregory P. Landis.

After consideration of the papers filed by the parties in support of and in opposition to the motion as well as the pleadings on file herein, and after hearing the argument of counsel,

IT IS HEREBY ORDERED:

1. The First Amended Complaint is dismissed without leave to amend as to plaintiff Allan H. Stubbs, who has conceded he lacks standing to maintain the action.

2. Plaintiff's Robinson-Patman Act claim is dismissed without leave to amend, plaintiff having conceded that it cannot allege actual purchases by it of steel strand from defendants.

3. Plaintiff's Sherman Act claims are dismissed with leave to amend because the First Amended Complaint

fails to state a claim for relief under either § 1 or § 2 of the Sherman Act. The essential facts alleged, that defendants entered into purchase and sale agreements for steel strand at a price below the Trigger Price Mechanism level and in violation of the federal Antidumping Act (19 U.S.C. § 160 *et seq.*, as amended 19 U.S.C. §§ 1673-1677), do not describe anticompetitive or predatory conduct within the meaning of the antitrust laws.

4. The Court grants plaintiff one more opportunity to file an amended complaint, by May 18, 1983. However, if plaintiff files such an amended complaint, it must plead, with specificity, facts demonstrating anticompetitive conduct that constitutes an antitrust violation. In particular, if plaintiff relies on a predatory pricing theory, plaintiff must state with specificity the elements of such a claim as required by controlling decisions of this court and of the Ninth Circuit.

5. If plaintiff files an amended complaint, then defendants shall have 30 days from date of service of such amended complaint to respond, plead, or otherwise move with respect to the amended complaint.

Dated: April 27, 1983

/s/ Marilyn Hall Patel
United States District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-82-6628-MHP

WESTERN CONCRETE STRUCTURES CO., INC., a California corporation,

Plaintiff,

vs.

MITSUI & COMPANY (U.S.A.), INC., et al.,

Defendants.

ORDER

(Filed September 13, 1983)

Defendants having moved this court to dismiss plaintiff's second amended complaint, the matter came on for hearing on August 22, 1983. The court having reviewed the papers filed in support of and in opposition to the motion, and all parties having been heard, the court makes the following order.

The court finds that plaintiff has failed to state a claim under the Sherman Act, 15 U.S.C. §§ 1 and 2. When stripped of its embellishments, the second amended complaint fails to allege anticompetitive conduct or antitrust injury. The essential facts alleged do not differ in substance from those in the first amended complaint, to wit, that defendants entered into purchase and sale agreements for steel strand at a price below the Trigger Price Mechanism level and in violation of the Anti-Dumping Act, 19 U.S.C. § 160 et seq.; as amended 19 U.S.C. §§ 1673-1677. As the court noted in its order granting defendants' motion to dismiss the first amended complaint, with leave to amend, such conduct, without more, is not anticompetitive or predatory within the meaning of the antitrust laws.

Plaintiff specifically states that it is not alleging predatory pricing, that is, pricing under marginal or average variable cost. Nor does it allege other conduct for which the antitrust laws provide a remedy. It is not true that every claim asserted should open the door to discovery. When, as here, a plaintiff has been given every opportunity to plead the facts necessary to state a cause of action (including, in this case, direction from the court as to what must be alleged) and has failed to do so, such a plaintiff cannot then expect to be allowed to proceed.

The court also finds that plaintiff lacks standing to bring suit under the Anti-Dumping Act of 1916, 15 U.S.C. § 72. The history of that Act suggests that a private cause of action might obtain as to a direct domestic competitor or an alleged dumper, but not as to a plaintiff in the position of Western Concrete Structures, who is a competitor of a purchaser from the alleged dumper. *See Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 494 F.Supp. 1190, 1211-12 (E.D. Pa. 1980). This court declines the invitation to extend a private cause of action for treble damages beyond the apparent intent of Congress.

Plaintiff having failed in its attempt to state a federal cause of action, the court will exercise its discretion on to dismiss the pendent state claims. At the hearing plaintiff was advised leave to amend to allege diversity jurisdictio would be granted on the state claims. Plaintiff has notified this court that diversity cannot be alleged. Accordingly,

IT IS ORDERED that defendants' motion to dismiss the second amended complaint is GRANTED.

Dated: September 13, 1983

/s/ Marilyn Hall Patel
United States District Judge

(p. 1) COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C 82-6628 MHP

WESTERN CONCRETE STRUCTURES CO., INC., a California Corporation,

Plaintiff,

vs.

MITSUI & COMPANY (USA) INC., a New York corporation; MITSUI BUSSAN KABUSHIKI KAISHA, a foreign corporation; VSL CORPORATION, INC., a California corporation; SHINKO WIRE CO. LTD., a foreign corporation; LOSINGER AG, a foreign corporation,

Defendants.

SECOND AMENDED COMPLAINT FOR: VIOLATION OF ANTITRUST LAWS TITLE 15 U.S.C. SECTIONS 1, 2, 8, 15 and 72; AND UNFAIR COMPETITION

(JURY TRIAL DEMANDED)

Plaintiff, WESTERN CONCRETE STRUCTURES CO., INC. brings this civil action against the above-named Defendants, and demanding a trial by jury, hereby alleges and complains as follows:

(p. 2) I.

## JURISDICTION AND VENUE

1. This action is for monetary damages and arises under the anti-trust laws of the United States and particularly under the Sherman Act (15 U.S.C. §§ 1 and 2), the Wilson Tariff Act (15 U.S.C. § 8), the 1916 Anti-dumping Act (15 U.S.C. § 72), and the Clayton Act (15 U.S.C. § 15).

2. Jurisdiction of this Court is based upon 28 U.S.C. §§ 1331 and 1337, 15 U.S.C. §§ 15 and 72, and this Court's general pendant jurisdiction.

3. Venue is proper in this court under 28 U.S.C. §§ 1391(b), (c) and (d), 15 U.S.C. § 15, 15 U.S.C. § 22 and 15 U.S.C. § 72.

## II.

## THE PARTIES AND THEIR BUSINESS

### A. WESTERN CONCRETE STRUCTURES CO., INC.

4. Plaintiff WESTERN CONCRETE STRUCTURES CO., INC. (hereinafter referred to as WESTERN) is a California corporation having its principal place of business at 19113 S. Hamilton Avenue, Gardena, California.

5. WESTERN has been in the business of prestressed concrete construction since 1958. It has been a contractor or subcontractor on many of the largest prestressed concrete strutures in the United States.

6. Prestressing by post-tensioning is a process whereby tendons formed of steel strands or wires for prestressed concrete (hereinafter referred to as "PC Strand") and other high quality steel components are placed into a particular configuration within (p. 3) a form

for a concrete member, such as a slab or girder. As used herein and by WESTERN in its business, a strand is composed of a number of wires, usually seven, twisted together; tendons are composed of a single strand, or of multiple strands, depending upon the job, placed between end-anchorage steel hardware. After the concrete has been poured and has hardened, the tendons are tensioned (i.e., stretched by massive force) while disposed within the concrete member. The stress resulting from the tensioning which results in stretched tendons is transferred to the ends of the concrete member through bearing plates and end-anchorge hardware to thereby compress the concrete for greater strength and improved structural characteristics.

7. At all times material herein, the business of WESTERN was divided into three categories, i.e., bridges, nuclear and commercial. The bridge division furnishes post-tensioning tendons, places such tendons and post-tensions the tendons for bridge structures, usually as a subcontractor to the general contractor. The commercial division sells post-tensioning tendons and/or bids upon and performs post-tensioning work on prestressed structures, other than bridges or nuclear reactors such as parking structures, buildings, and the like.

B. VSL CORPORATION and LOSINGER AG

8. VSL CORPORATION (hereinafter referred to as "VSL") is a California corporation having its principal office at 101 Albright Way, Los Gatos, California.

9. VSL is a wholly owned subsidiary of Losinger, AG of Bern, Switzerland.

(p. 4) 10. VSL is in the same business as WESTERN as set out in paragraphs 6 and 7. VSL supplies and installs prestressing tendons and performs post-tensioning services in direct competition with WESTERN and others in the three categories of WESTERN's business.

11. Defendant LOSINGER AG (hereinafter "LOSINGER") is an alien corporation (or corresponding Swiss business entity) with its principal office in Bern, Switzerland. LOSINGER is the parent company of VSL. LOSINGER is reputed to be the largest contractor in Switzerland.

12. LOSINGER has been doing business in this District through its subsidiary and agent VSL.

13. LOSINGER'S direct activities in this District are continuous and systematic. LOSINGER participates in the activities of VSL directly by supervision and control of VSL's activities, especially the financial activities of VSL. At least one of the officers of VSL was a director of LOSINGER at all times material to this claim. Officers and/or directors of LOSINGER have made frequent visits to the United States and this District to supervise the activities of VSL. Financial and business dealings of VSL are participated in and supervised by LOSINGER. A substantial management fee is paid by VSL to LOSINGER pursuant to a management contract between VSL and LOSINGER. Commissions are paid by VSL to LOSINGER for world-wide purchases for VSL by LOSINGER including purchases from MITSUI.

C. *The Japanese Suppliers.*

14. At all times material herein, defendant MITSUI BUSSAN KABUSHIKI KAISHA, also known as MIT-

SUI & CO., LTD. and MBK (here (p. 5) inafter referred to as "MITSUI (Japan)"), was, and is, a Japaneses trading company with a "head office" located in Tokyo, Japan, and with subsidiary offices located around the world.

15. Defendant MITSUI AND COMPANY (U.S.A.), INC. (hereinafter referred to as "MITSUI (U.S.A.)"), is a subsidiary of Mitsui (Japan) and is a New York corporation, with principal offices located in New York City. Defendant MITSUI (U.S.A.) has branch offices throughout the United States, including an office located in San Francisco, California, in the Northern District of California.

16. MITSUI (U.S.A.) distributes within the United States goods purchased from, and through, MITSUI (Japan) and imported into the United States by MITSUI (U.S.A.) and MITSUI (Japan). One of the steel products imported into the United States by and through MITSUI (Japan) and MITSUI (U.S.A.) is PC Strand, as described in paragraph 6, manufactured by SHINKO and sold by MITSUI as SHINKO's agent.

17. At all times material herein, MITSUI (Japan) marketed, and continues to market a number of products, including PC Strand both directly and through its subsidiary, MITSUI (U.S.A.).

18. MITSUI (Japan) transacts business in this District on a systematic and continuous basis.

19. This claim against MITSUI (Japan) arises in part out of, and results from, MITSUI's (Japan) activities in this District.

20. Defendant SHINKO WIRE CO. LTD. (hereinafter "SHINKO") is an alien corporation (or comparable

Japanese business entity) which is a manufacturer in Japan of steel products including PC (p. 6) Strand which were, and are, sold by MITSUI (Japan) and MITSUI (U.S.A.) in this District.

21. Defendant SHINKO's head office is located in Amagaski, Japan. SHINKO also has a subsidiary or branch office and plant in Houston, Texas, U.S.A. known as Shinko Wire American, Inc.

22. Defendant SHINKO, is doing and has done business and conducted activities on a continuous and systematic basis in this District directly (through salesmen, representatives and officers of SHINKO from Japan), including, but not limited to, conducting sales calls and business calls upon prospective and actual customers of SHINKO (including WESTERN) for PC Strand.

23. SHINKO has done, and is doing business in this District through the trading companies MITSUI (Japan) and MITSUI (U.S.A.). SHINKO manufactures much of the PC Strand which is sold by MITSUI, (both U.S.A. and Japan) and assists MITSUI (both Japan and U.S.A.), in various ways in the sale of such PC Strand and other steel products including direct visits to actual or prospective customers, including WESTERN, by its sales personnel, executives or representatives.

24. All of the defendants, MITSUI (U.S.A.), MITSUI (Japan), SHINKO, VSL and LOSINGER, individually and collectively performed acts and conducted business in, or related to, this District which gave rise to and resulted in this claim by WESTERN.

(p. 7) II.

## GENERAL ALLEGATIONS

25. WESTERN and its post-tensioning competitors including VSL are end-users of steel strand for pre-stressed concrete (PC Strand). In competitive bidding for the sale of tendons assembled from PC Strand or the sale and installation thereof as a post-tensioning contractor or subcontractor, the price of the PC Strand to post-tensioning companies as end-users is the controlling factor in determining the sales price of tendons or bid price for post-tensioning services by the post-tensioning companies. The price paid for the required PC Strand is a large portion of the price of the tendons and/or the installation thereof and even a relatively small price differential in the PC Strand results in a differential in bid prices which cannot be overcome by efficiency of the services performed or compensated for in the profit margin. For example, the cost of PC Strand comprises approximately 55% of the direct cost of post-tensioning service and the profit margin allowed by WESTERN in its bids is approximately 8% of direct cost.

26. In the construction of bridges or commercial structures the type of construction, i.e., post-tensioned, pre-tensioned, reinforced, or structural is determined by the architect, customer or general contractor. If, for example, Cal Trans specifies a post-tensioned freeway bridge only post-tensioners such as VSL, WESTERN or their competitior post-tensioners will bid on the contract.

27. WESTERN is informed and believes and thereon alleges that VSL through its conspiracy and predatory conduct was obtaining PC Strand from MITSUI at prices 15% to 20% less than VSL's (p. 8) competitors, including WESTERN, could purchase PC Strand of like quality.

28. A price differential of less than 20% of PC Strand which forms approximately 55% of the direct cost of post-tensioning services would, and did, allow VSL to bid or negotiate at a price which its competitors, including WESTERN could not match even by foregoing all or substantially all of the indirect costs and all of the profit margin. No increased efficiency or design change could make up the differential in direct cost. That situation allowed VSL to make high profits or to attempt to establish a monopoly.

29. At all times material herein, the 1921 Anti-Dumping Act, 19 U.S.C. §§ 160 *et seq.*, as amended 19 U.S.C. §§ 1673-1677, provided for the imposition of dumping duties when it was determined that foreign merchandise was imported into the United States at less than fair value and that these sales would injure an industry of the United States.

30. On or about December 30, 1977, the Treasury Department of the United States announced the implementation of a program for monitoring the prices of steel mill products imported into the United States, which monitoring device was referred to as the Trigger Price Mechanism ("TPM"). Commencing on or about February, 1978, the Treasury Department published "trigger prices" which were based upon the production costs of the most efficient steel manufacturers. If imported steel products were found to be sold at less than the trigger price, an anti-dumping investigation pursuant to the 1921 Anti-Dumping Act could be instituted by the (p. 9) appropriate department on its own initiative and dumping duties assessed.

31. At all times material herein, the 1916 Anti-Dumping Act, 15 U.S.C. § 72, provided for a private right

of action to persons who were injured in their person or business as a result of common and systematic importation and sale of articles within the United States at a price substantially less than their actual market value or wholesale price in the principal markets of their production, or of other foreign countries to which they are commonly exported.

32. Since at least December 30, 1977, Defendants have engaged in a pattern and practice of conspiracy and predatory conduct to violate the laws of the United States affecting interstate trade and commerce in PC Strand including the acts set out above.

33. All of the acts of Defendants in accomplishing and furthering the conspiracy and predatory conduct in furtherance of, and as the object of, the conspiracy in restraint of trade are not presently known to the Plaintiff but some of said acts include conspiring and agreeing that the sale of SHINKO PC Strand in the United States by MITSUI (Japan) and MITSUI (U.S.A.) to VSL would be, and was, at a price which was below the fair value, TPM, or actual market value or wholesale price of such PC Strand and was therefore unavailable to competitors of VSL under the then prevailing laws of the United States. Such price was substantially lower than the price quoted by MITSUI (U.S.A.) to WESTERN and other competitors for identical SHINKO strand at the same period of time.

(p. 10) 34. The acts of conspiracy and predatory conduct resulting in lesser prices by MITSUI and purchase thereof by VSL in restraint of trade was accomplished by each and all of the Defendants by making and

using false writings and documents, making false and fraudulent statements and representations and falsifying and concealing by scheme and device certain material facts to achieve rebates and discounts to VSL and/or LOSINGER in order that the falsified legal invoice prices were fraudulently lowered to actual prices agreed to between MITSUI (Japan and U.S.A.), SHINKO, VSL, and LOSINGER which prices were unavailable to VSL's competitors even if known to them.

35. The prices provided to VSL by MITSUI were in violation of the United States Anti-Dumping Act, 19 U.S.C. § 160 *et seq.* as amended, 19 U.S.C. §§ 1673-1677, and in violation of minimum "trigger prices" set by the Treasury Department of the United States for imported PC Strand.

36. VSL has pleaded guilty to a grand jury indictment No. CR 82-0410 RHS alleging the facts as set out in paragraphs 32 through 35.

37. MITSUI (U.S.A.) has pleaded guilty to grand jury indictment No. CR 82-0410 filed on or about July 20, 1982 in the United States District Court for the Northern District of California alleging in substance the facts as set out in paragraphs 32 through 35 and a violation of Title 18 U.S.C. § 371 and Title 18 U.S.C. § 1001.

(p. 11) 38. The prices provided to VSL by MITSUI were also in violation of the Anti-Dumping Act of 1916, 15 U.S.C. § 72 in that they were less than the actual market value or wholesale price contemplated in that Act.

39. WESTERN did not discover the acts and practices set out in paragraphs 32 through 35 until MITSUI

(U.S.A.) and certain individual employees of MITSUI (U.S.A.) and MITSUI (Japan) were indicted on or about July 20, 1982 and all of such acts are not yet fully known by WESTERN although WESTERN is informed and believes and upon such information and belief alleges that acts of conspiracy by and among the Defendant's in addition to those set out in paragraphs 27 through 38 did occur and are occurring.

III.

FIRST CAUSE OF ACTION FOR
VIOLATION OF THE U.S. SHERMAN ACT
15 U.S.C. § 1 AND CLAYTON ACTS 15 U.S.C. § 4.

40. WESTERN herein incorporates by reference the allegations of paragraphs 1 through 39 as though again fully set forth.

41. At least as early as January 1, 1978, the exact date being unknown to Plaintiff, and continuously thereafter up to about June of 1981 within the Northern District of California and elsewhere Defendants MITSUI (Japan), MITSUI (U.S.A.), SHINKO, LOSINGER and VSL through their officers and agents (unnamed individually herein) did unlawfully, knowingly and willfully conspire, combine and agree together, with each other, and with diverse other persons both known and unknown to Plaintiff to enter into conspiratorial agreements, (as set out more particularly in (p. 12) preceding paragraphs 27, and 32 and in paragraph 42 hereinafter) which were intended to harm or unreasonably restrain competition, (as set out more particularly in preceding paragraphs 33, 34 and 35 and in paragraphs 43 through 45 hereinafter)

which actually caused injury to competition, including Plaintiff, (as set out more particularly in preceding paragraphs [sic] 28, and paragraphs 46 and 47 hereinafter) in violation of 15 U.S.C. § 1 and § 15.

42. All of the acts of Defendants in conspiring and agreeing among themselves are not known to Plaintiff but such acts of consipracy and agreement are set out in paragraphs 32 and 33 and include, in general, meetings held in the U.S. and Japan between various and all of the Defendants at diverse times arranging for the sale to VSL through Losinger by the Japanese suppliers which would be sold to VSL at prices not available to VSL's competitors and which were disguised by the clandestine acts set out in paragraphs 34.

43. The predatory conduct of the Defendants was intended to, and did, suppress and restrain competition of VSL in the post-tensioning industry.

44. The prices of PC Strand sold only to VSL by MITSUI as a result and object of the conspiracy were substantially less than the price at which VSL's competitors in the post-tensioning business, including WESTERN, could legally purchase PC Strand of like quality from MITSUI, other Japanese manufacturers, from U.S. suppliers or elsewhere.

45. The prices to VSL achieved through conspiracy and predatory practices were intended to harm or unreasonably restrain competition particularly in that the end-user competitors of VSL, (p. 13) including WESTERN, could not compete with VSL on bids for or negotiated prices bridges or commercial projects when VSL was able to obtain PC Strand at a price substantially less than that

at which any competitor of VSL, including WESTERN could legally obtain PC Strand of like quality from any source.

46. The predatory acts of the Defendants actually caused injury to competition and to the competitors of VSL, including WESTERN, in that competitors could not meet the bid price or negotiated price of VSL for post-tensioned projects.

47. WESTERN is informed and believes and thereon alleges that in 1977 in the bridge post-tensioning business there were five substantial competitors of VSL (including WESTERN) and two lesser competitors. (Substantial competitor refers to those competitors against whom VSL normally competed for bids or negotiated for post-tensioning projects while a lesser competitor was one who was not a significant factor in such projects except upon an occasional or special project). Of the five 1977 substantial bridge competitors, one remains at present. Two of the 1977 bridge competitors are completely out of business; one is out of the post-tensioning business; and one no longer operates in California. One of the lesser competitors became substantial; one went out of the post-tensioning business; and there are presently two new lesser competitors. The asset's, personnel and contracts of one of the substantial 1977 bridge competitors were acquired by VSL. In commercial post-tensioning there were three substantial competitors and one lesser competitor of VSL in 1977 (including WESTERN). VSL had already earlier acquired the assets of the leading commercial post-tension. The three 1977 substantial (p. 14) commercial competitors are no longer in the business. The 1977 lesser competitor

remains and three new competitors have recently entered the commercial market.

48. WESTERN is informed and believes and thereon alleges that due to the predatory practices of the Defendants, the competitors of VSL could not profitably compete with VSL for the cost reasons set out in paragraph 28 and the number of competitors was reduced as set out in paragraph 47.

49. As a direct and proximate cause of the above set forth activities of Defendants in violation of 15 U.S.C. § 1 WESTERN was damaged in its business and property.

*SECOND CAUSE OF ACTION*
*FOR VIOLATION OF 15 U.S.C. § 2 AND § 15*

50. WESTERN incorporates herein by reference the allegations of paragraphs 1 through 49.

51. At least as early as December 30, 1977, the exact date being unknown to Plaintiff, and continuously thereafter up to about June of 1981, Defendants MITSUI (Japan), MITSUI (U.S.A.), SHINKO, LOSINGER and VSL, through their officers and agents (unnamed individually herein) unlawfully conspired to, attempted to, and did eventually, in fact, monopolize the bridge and commercial post-tensioning industries in California and throughout the United States.

52. As set forth in more detail in paragraphs 25 through 39 above, Defendants conspired and agreed among themselves to arrange for the sale of PC Strand at prices below fair market value, and substantially less than actual market value or wholesale price. (p. 15) Defendants so con-

spired and attempted the above with the specific intent to control prices in the bridge and commercial post-tensioning industries and to destroy competition in these post-tensioning industries.

53. Defendants willfully engaged in the predatory and anti-competitive conduct alleged in paragraphs 33 through 35 for the purpose of accomplishing their unlawful anti-competitive purpose.

54. Because of the unavailability of PC Strand to competitors of VSL at the prices received by VSL, there existed a dangerous probability of success for VSL to monopolize the post-tensioning industries and in fact VSL has monopolized these bridge and commercial post-tensioning industries and has willfully maintained its power to control prices and exclude competitiors by purchasing PC Strand at prices legally unavailable to its competitors. Defendants obtained this monopoly power in the absence of any economic efficiencies or by providing superior services or products.

55. WESTERN is informed and believes and thereon alleges that between 1979 and the present VSL's share of the post-tensioning market in commercial and bridge post-tensioning was never less than 50% and reached 70% or more.

56. WESTERN from 1974 through 1977 had an average of approximately 15% of the market as its market share of the commercial business. In 1978, WESTERN's share of the commercial post-tensioning business decreased from 14.8% in 1977 to 3.9% in 1978, and diminished steadily until it went out of business in this area. In the bridge post-tensioning business WESTERN in 1977 had a 13.4%

share of the nationwide post-tensioned bridge projects. (p. 16) In 1978 WESTERN share of post-tensioned bridge projects nationwide dropped to 5.4%.

57. As a direct and proximate result of Defendants' conspiracy to, attempt to and successful monopolization of the post-tensioning industry, competition in the industry has been damaged and in particular Plaintiff has been injured.

*THIRD CAUSE OF ACTION*
*FOR VIOLATION OF THE WILSON TARIFF ACT*

*U.S.C. TITLE 15, § 8 AND TITLE 15, § 15.*

58. Plaintiff by reference and incorporation repeats and realleges paragraphs 1 through 57 as though fully set forth herein.

59. At least as early as January 1, 1978, the exact date being unknown to Plaintiff, and continuously thereafter up to about June of 1981, within the Northern District of California, defendants MITSUI (Japan) and MITSUI (U.S.A.), SHINKO, LOSINGER and VSL did unlawfully, knowingly and willfully conspire and contract for the importation of steel wire strand for prestressed concrete from Japan into the United States with the intention to operate in restraint of lawful trade as well as in restraint of free competition in lawful trade and commerce.

60. As a direct and proximate cause of the above activities in violation of Title 15 U.S.C. §§ 8 and 15. WESTERN has been damaged in its business and property.

(p. 17) *FOURTH CAUSE OF ACTION FOR DAMAGES UNDER THE 1916 ANTI-DUMPING ACT (15 U.S.C. § 72)*

61. Plaintiff refers to paragraphs 1 through 60 and incorporates the same herein by reference.

62. Defendants by themselves and in combination and conspiracy with each other commonly and systematically imported and sold in the United States, or caused to be imported and sold in the United States, PC Strand at prices substantially less than the actual market value or wholesale price of such products in Japan, or in the principal markets of other foreign countries to which they are commonly exported, after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States.

63. These acts were done by Defendants with the intent of restraining or monopolizing the trade in commerce of PC Strand and in the related post-tensioning industries.

64. The above acts of the Defendants are in violation of the 1916 Anti-Dumping Act, 15 U.S.C. § 72, and as a direct and proximate result WESTERN has been injured in its business or property by reason of the violation of, and the combination or conspiracy to violate 15 U.S.C. § 72.

(p. 18) *FIFTH CAUSE OF ACTION AGAINST VSL FOR UNFAIR COMPETITION.*

65. By reference and incorporation Plaintiff repeats and realleges paragraphs 1 through 64 as though fully set forth herein.

66. By reason of its illegal conspiracies in restraint of trade by which VSL obtained steel wire strand for pre-

stressed concrete at a price not available to WESTERN, VSL has unfairly competed with WESTERN.

67. As a direct and proximate result of the above unfairly competitive activities of VSL WESTERN has been damaged in its property and business.

*PRAYER FOR RELIEF*

WHEREFORE PLAINTIFF PRAYS FOR judgment as follows:

1. That Defendants be adjudged to have violated the anti-trust laws as hereinbefore alleged;

2. That the actual damages of $3,200,000.00 to Plaintiff's business and property proximately resulting from those violations be determined;

3. That Plaintiff have judgment for three times the amount of its actual damages, together with costs and a reasonable attorneys' fee, as required by law;

(p. 19) 4. That Plaintiff be awarded its costs of suit; and

5. That Plaintiff have such other and further relief as the Court may deem proper.

SPENSLEY HORN JUBAS
& LUBITZ
By /s/ W. Robert Spensley
Attorneys for Plaintiff

Dated: May 17, 1983

(p. 20) Plaintiff hereby demands trial by jury pursuant to Rule 38(b), Federal Rules of Civil Procedure.

SPENSLEY HORN JUBAS
& LUBITZ

By /s/ W. Robert Spensley
Attorneys for Plaintiff

Dated: May 17, 1983

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## STATUTORY PROVISIONS INVOLVED

### Section 1 of the Sherman Act, 15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

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### Section 2 of the Sherman Act, 15 U.S.C. § 2

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred

thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.)

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15 U.S.C. § 8

§ 8. Trusts in restraint of import trade illegal; penalty

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Aug. 27, 1894, c. 349, § 73, 28 Stat. 570; Feb. 12, 1913, c. 40, 37 Stat. 667.

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## 19 U.S.C. § 160*

### Dumping Investigation

### § 160. Foreign merchandise sold or likely to be sold at less than fair value

#### Initiation of investigation by International Trade Commission; determination of injury to United States industry; finding; publication of finding

(a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States International Trade Commission (hereinafter called the "Commission"), and the Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160 to 171 of this title called a "finding") of his determination and the determination of the Commission. For the purposes of this subsection,

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* The Antidumping Act of 1921 was repealed by § 106(a) of the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (Supp. V 1981) and replaced by new Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. §§1673-1677g (Supp. V 1981).

the Commission shall be deemed to have made an affirmative determination if the Commissioners of the Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

Procedure when Secretary of Treasury has not published his finding and that of International Trade Commission; determination by Secretary; publication; withholding of appraisement

(b) (1) In the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, he shall, within six months after the publication under subsection (c) (1) of this section of a notice of initiation of an investigation—

(A) determine whether there is reason to believe or suspect, from the invoice or other papers or from information presented to him or to any other person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value); and

(B) if his determination if affirmative, publish a notice of that fact in the Federal Register, and require, under such regulations as he may prescribe, the withholding of appraisement as to such merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of that notice in the Federal Register (or such earlier date, not more than one hundred and twenty days before the date of publication under subsection (c) (1) of

this section of notice of initiation of the investigation, as the Secretary may prescribe), until the further order of the Secretary, or until the Secretary has made public a finding as provided for in subsection (a) of this section in regard to such merchandise; or

(C) if his determination is negative (or if he tentatively determines that the investigation should be discontinued), publish notice of that fact in the Federal Register.

(2) If in the course of an investigation under this subsection the Secretary concludes that the determination provided for in paragraph (1) cannot reasonably be made within six months, he shall publish notice of this in the Federal Register, together with a statement of reasons therefor, in which case the determination shall be made within nine months after the publication in the Federal Register of the notice of initiation of the investigation.

(3) Within three months after publication in the Federal Register of a determination under paragraph (1), the Secretary shall make a final determination whether the foreign merchandise in question is being or is likely to be sold in the United States at less than its fair value (or a final discontinuance of the investigation).

Information to Secretary of Treasury alleging that foreign merchandise is being sold or is likely to be sold at less than fair value; determination of whether to initiate investigation; publication; substantial doubt

(c) (1) The Secretary shall, within thirty days of the receipt of information alleging that a particular class or kind of merchandise is being or is likely to be sold in the United States or elsewhere at less than its fair value and that an industry in the United States is being or is

likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, determine whether to initiate an investigation into the question of whether such merchandise in fact is being or is likely to be sold in the United States or elsewhere at less than its fair value. If his determination is affirmative he shall publish notice of the initiation of such an investigation in the Federal Register. If it is negative, the inquiry shall be closed.

(2) If, in the course of making a determination under paragraph (1), the Secretary concludes, from the information available to him, that there is substantial doubt whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, he shall forward to the Commission the reasons for such substantial doubt and a preliminary indication, based upon whatever price information is available, concerning possible sales at less than fair value, including possible margins of dumping and the volume of trade. If within thirty days after receipt of such information from the Secretary, the Commission, after conducting such inquiry as it deems appropriate, determines there is no reasonable indication that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, it shall advise the Secretary of its determination and any investigation under subsection (b) of this section then in progress shall be terminated.

Hearing; publication of determination, findings, conclusions, and reasons or bases therefor

(d) (1) Before making any determination under subsection (a) of this section, the Secretary or the Commission, as the case may be, shall, at the request of any foreign manufacturer or exporter, or any domestic importer, of the foreign merchandise in question, or of any domestic manufacturer, producer, or wholesaler of merchandise of the same class or kind, conduct a hearing at which—

(A) any such person shall have the right to appear by counsel or in person; and

(B) any other person, firm, or corporation may make application and, upon good cause shown, may be allowed by he Secretary or the Commission, as the case may be, to intervene and appear at such hearing by counsel or in person.

(2) The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the Commission, upon making its determination under subsection (a) of this section, shall publish in the Federal Register such determination, whether affirmative or negative, together with a complete statement of findings and conclusions, and the reasons or bases therefor, on all the material issues of fact or law presented (consistent with confidential treatment granted by the Secretary or the Commission, as the case may be, in the course of making its determination).

(3) The hearings provided for under this section shall be exempt from sections 554, 555, 556, 557, and 702 of Title 5. The transcript of any hearing, together with all information developed in connection with the investigation (other than items to which confidential treatment has

been granted by the Secretary or the Commission, as the case may be), shall be made available in the manner and to the extent provided in section 552(b) of Title 5.

May 27, 1921, c. 14, § 201, 42 Stat. 11; Sept. 1, 1954, c. 1213, Title III, § 301, 68 Stat. 1138; Aug. 14, 1958, Pub.L. 85-630, §§ 1, 4(b), 72 Stat. 583, 585; Jan. 3, 1975, Pub.L. 93-618, Title III, § 321(a), 88 Stat. 2043.

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19 U.S.C. §§ 1673, 1673a, 1673e

§ 1673. Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the mer-

chandise. For purposes of this section and section 1673 (b) (1) of this section, a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

(As amended Oct. 30, 1984, Pub.L. 98-573, Title VI, § 602 (b), 98 Stat. 3024.)

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§ 1673a. Procedures for initiating an antidumping duty investigation

(a) Initiation by administering authority—

(1) In general.—An antidumping duty investigation shall be commenced whenever the administering authority determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 1673 of this title exist.

(2) Cases involving persistent dumping.—

(A) Monitoring.—The administering authority may establish a monitoring program with respect to imports of a class or kind of merchandise from any additional supplier country for a period not to exceed one year if—

(i) more than one antidumping order is in effect with respect to that class or kind of merchandise;

(ii) in the judgment of the administering authority there is reason to believe or suspect an extraordinary pattern of persistent injurious dumping from one or more additional supplier countries; and

(iii) in the judgment of the administering authority this extraordinary pattern is causing a serious commercial problem for the domestic industry.

(B) If during the period of monitoring referred to in subparagraph (A), the administering authority determines that there is sufficient information to commence a formal investigation under this subsection regarding an additional supplier country, the administering authority shall immediately commence such an investigation.

(C) Definition.—For purposes of this paragraph, the term "additional supplier country" means a country regarding which no antidumping investigation is currently pending, and no antidumping duty order is currently in effect, with respect to imports of the class or kind of merchandise covered by subparagraph (A).

(D) Expeditious action.—The administering authority and the Commission, to the extent practicable, shall expedite proceedings under this part undertaken as a result of a formal investigation commenced under subparagraph (B).

(b) Initiation by petition.—

(1) Petition requirements.—An antidumping proceeding shall be commenced whenever an interested party described in subparagraph (C), (D), or (E) of section 1677(9) of this title files a petition with the administering authority, on behalf of an industry which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations. The petition may be amended at such time, and upon such conditions, as the administering authority and the Commission may permit.

(2) Simultaneous filing with Commission.—The petitioner shall file a copy of the petition with the Commission on the same day as it is filed with the administering authority.

(c) Petition determination.—Within 20 days after the date on which a petition is filed under subsection (b) of this section, the administering authority shall—

(1) determine whether the petition alleges the elements necessary for the imposition of a duty under section 1673 of this title and contains information reasonably available to the petitioner supporting the allegations,

(2) if the determination is affirmative, commence an investigation to determine whether the class or kind of merchandise described in the petition is being, or is likely to be, sold in the United States at less than its fair value, and provide for the publication of notice of the determination in the Federal Register, and

(3) if the determination is negative, dismiss the petition, terminate the proceeding, notify the petitioner in writing of the reasons for the determination, and provide for the publication of notice of the determination in the Federal Register.

(d) Notification to Commission of determination.—The administering authority shall—

(1) notify the Commission immediately of any determination it makes under subsection (a) or (c) of this section, and

(2) if the determination is affirmative, make available to the Commission such information as it may have relating to the matter under investigation, under such procedures as the administering authority and the Commission may establish to prevent disclosure, other than with the consent of the party pro-

viding it or under protective order, of any information to which confidential treatment has been given by the administering authority.

(As amended Oct. 30, 1984, Pub.L. 98-573, Title VI, § 609, 98 Stat. 3030.)

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§ 1673e. Assessment of duty

(a) Publication of antidumping duty order.—Within 7 days after being notified by the Commission of an affirmative determination under section 1673d(b) of this title, the administering authority shall publish an antidumping duty order which—

(1) directs customs officers to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise, within 6 months after the date on which the administering authority receives satisfactory information upon which the assessment may be based, but in no event later than—

(A) 12 months after the end of the annual accounting period of the manufacturer or exporter within which the merchandise is entered, or withdrawn from warehouse, for consumption, or

(B) in the case of merchandise not sold prior to its importation into the United States, 12 months after the end of the annual accounting period of the manufacturer or exporter within which it is sold in the United States to a person who is not the exporter of that merchandise,

(2) includes a description of the class or kind of merchandise to which it applies, in such detail as the administering authority deems necessary, and

(3) requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time an estimated normal customs duties on that merchandise are deposited.

(b) Imposition of duty.—

(1) General rule.—If the Commission, in its final determination under section 1673d(b) of this title, finds material injury or threat of material injury which, but for the suspension of liquidation under section 1673b(d) (1) of this title would have led to a finding of material injury, then entries of the merchandise subject to the antidumping duty order, the liquidation of which has been suspended under section 1673b(d) (1) of this title, shall be subject to the imposition of antidumping duties under section 1673 of this title.

(2) Special rule.—If the Commission, in its final determination under section 1673d(b) of this title, finds threat of material injury, other than threat of material injury described in paragraph (1), or material retardation of the establishment of an industry in the United States, then merchandise subject to an antidumping duty order which is entered, or withdrawn from warehouse, for consumption on or after the date of publication of notice of an affirmative determination of the Commission under section 1673d(b) of this title shall be subject to the assessment of antidumping duties under section 1673 of this title, and the administering authority shall release any bond or other security, and refund any cash deposit made, to secure the payment of antidumping duties with respect to entries of the merchandise entered, or withdrawn from warehouse, for consumption before that date.

(c) Security in lieu of estimated duty pending early determination of duty.—

(1) Conditions for waiver of deposit of estimated duties.—The administering authority may permit, for not more than 90 days after the date of pub-

lication of an order under subsection (a) of this section, the posting of a bond or other security in lieu of the deposit of estimated antidumping duties required under subsection (a) (3) of this section if, on the basis of information presented to it by any manufacturer, producer, or exporter in such form and within such time as it may require, it is satisfied that it will be able to determine, within 90 days after the date of publication of an order under subsection (a) of this section, the foreign market value and the United States price for all merchandise of such manufacturer, producer, or exporter described in that order which was entered, or withdrawn from warehouse, for consumption on or after the date of publication of—

(A) an affirmative preliminary determination by the administering authority under section 1673b(b) of this title, or

(B) if its determination under section 1673b(b) of this title was negative, an affirmative final determination by the administering authority under section 1673d(a) of this title,

and before the date of publication of the affirmative final determination by the Commission under section 1673d(b) of this title.

(2) Notice; hearing.—If the administering authority permits the posting of a bond or other security in lieu of the deposit of estimated antidumping duties under paragraph (1), it shall—

(A) publish notice of its action in the Federal Register, and

(B) upon the request of any interested party, hold a hearing in accordance with section 1677c of this title before determining the foreign market value and the United States price of the merchandise.

(3) Determinations to be basis of antidumping duty.—The administering authority shall publish no-

tice in the Federal Register of the results of its determination of foreign market value and United States price, and that determination shall be the basis for the assessment of antidumping duties on entries of merchandise to which the notice under this subsection applies and also shall be the basis for the deposit of estimated antidumping duties on future entries of merchandise of manufacturers, producers, or exporters described in paragraph (1) to which the order issued under subsection (a) of this section applies.

June 17, 1930, c. 497, Title VII, § 736, as added July 26, 1979, Pub.L. 96-39, Title I, § 101, 93 Stat. 172.

85-268

No. 84-

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1984

Mitsui & Company (U.S.A.), Inc.; Mitsui Bussan Kabushiki Kaisha; VSL Corporation, Inc.; Shinko Wire Co., Ltd. and Losinger AG,

*Petitioners,*

v.

Western Concrete Structures Co., Inc.,

*Respondent.*

## APPENDIX B TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**List of Related Companies Required by United States Supreme Court Rule 28.1**

The subsidiaries and affiliates (except wholly owned) of the Petitioners are:

**Mitsui & Co. (U.S.A.), Inc.**

Astral International Corp.
Avant Petroleum, Inc.
Channel Terminal Corp.
Durakut International Corp.
Echo, Inc.
Gulf Coast Grain, Inc.
Hino Motors (U.S.A.), Inc.
Inorgchem Developments, Inc.
Intermodal Terminal, Inc.
Kanda Telecom, Inc.
Maxitanks Shipping, Inc.
MBK Construction Equipment, Inc.
McCarty Resources Corp.
MHI Corrugating Machinery Co.
Mitex Leasing Corp.
Mitsui Grain Corp.
Mitsui Seiki (U.S.A.), Inc.
Mitsui Tubular Products, Inc.
Mitsui Yoshioka do Brasil S.A.
M.M.T.S., Inc.
M.T.M. Partners, L.P.
Neptune Packing, Inc.
Nutrius, Inc.
Nymitech, Inc.
Ocean Packing Corp.
Okuma Machinery, Inc.
Pacific Grain Co.
Pacific Resources, Inc.
Pesquera San Carlos, Inc.
Pesquera San Jose, Inc.
Pesquera San Miguel, Inc.
Petroleum H.B., Ltd.
Petroleum H.B. (1976), Ltd.
Petroleum H.B. (1981), Ltd.

Petroleum H.B. (1982), Ltd.
Portac, Inc.
Red-White Valve Corp.
Soma Sports, Inc.
SSC International, Inc.
TCM America (MBK), Inc.
Trivella, Inc.
United Grain Corp.
U.S. Phosphate Corp.
Van Brunt Port Jersey Warehouse, Inc.
Weisner Steel Products, Inc.
Win Fisheries, Inc.
Yanmar Tractor (U.S.A.), Inc.

**VSL Corporation and Losinger AG**

VSL is a wholly owned subsidiary of Losinger AG. Losinger AG is 50% owned by Enserch Corporation.

**Shinko Wire Co., Ltd.**

Kobe Steel, Ltd. is the parent corporation and Shinko Wire America, Inc. is the subsidiary of Shinko Wire Co., Ltd.

**Mitsui Bussan Kabushiki Kaisha ("MBK")**

Asia Air Survey Co., Ltd.
Ceylon Synthetic Textile Mills, Ltd.
Cheil Synthetic Textiles Co., Ltd.
Chubu Steel Plate Co., Ltd.
Chuo Build Industry Co., Ltd.
Daido Steel Sheet Corp.
Daito Woolen Spinning & Weaving Co., Ltd.
F-One, Ltd.
Fujikisen Kaisha, Ltd.
Godo Steel, Ltd.
Hakodate Seimo Sengu Co., Ltd.
Hohnen Oil Co., Ltd.
Honshu Chemical Industry Co., Ltd.
Katakura Industries Co., Ltd.
Kawakami Paint Mfg. Co., Ltd.
Kioritz Corp.

Marufuji Sheet Piling Co., Ltd.
Mikuni Coca Cola Bottling Co., Ltd.
Mistui Mining Co., Ltd.
Mitsui Petrochemical Industries, Ltd.
Mitsui Sugar Co., Ltd.
Nippon Formula Feed Manufacturing Co., Ltd.
Nippon Soda Co., Ltd.
Nippon Univac Co., Ltd.
Okano Valve Mfg., Co.
Okazaki Kogyo Co., Ltd.
Sakurajima Futo Co., Ltd.
Shimura Kako Co., Ltd.
Showa Industry Co., Ltd.
Suzuki Metal Industry Co., Ltd.
Taiheiyo Kouhatsu, Inc.
Taito Co., Ltd.
Takasago Tekko Co., Ltd.
Takasaki Paper Mfg. Co., Ltd.
Thai Plastic and Chemical Co., Ltd.
Thai Tin Plate Manufacturing Co., Ltd.
Toho Titanium Co., Ltd.
Tokai Kanko Co., Ltd.
Toyo Engineering Corp.
Utoku Express Co., Ltd.
Yoshihara Oil Mill, Ltd.

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CLERK

No. 85-268 (3)

In The
# Supreme Court of the United States
October Term, 1985

Mitsui & Company (USA), Inc.; Mitsui Bussan Kabushiki Kaisha; VSL Corporation, Inc; Shinko Wire Co., Ltd. and Losinger AG,

*Petitioners,*

v.

Western Concrete Structures Co., Inc.,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION

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## I.

## QUESTIONS PRESENTED

Petitioner has framed the questions presented in the petition (Petition p. i) academically and overly broad in terms of premises which are not part of the record in this case. Consequently, respondents have reframed those questions to be more consistent with the record in *this* case.

The questions which should be presented by the petition are:

1. Whether the Court of Appeals erred in holding that a viable cause of action under Section 1 of the Sherman Act is stated when the complaint alleges the factual bases of conspiratorial predatory conduct by each and all of the defendants to restrain trade in the post-tensioning industry, by conspiring and importing steel strand from Japan through subterfuge and fraud at prices lawfully unavailable to the competitors of the conspirator post-tensioner defendant, so that the post-tensioner defendant could and did underbid its competitors, including plaintiff, and could and did exclude those competitors.

2. Whether the Court of Appeals erred in holding that plaintiff stated causes of action under Section 2 of the Sherman Act, by alleging that the defendants agreed that the defendant suppliers of post-tensioning steel strand would sell strand to the post-tensioner defendant through conspiracy and subterfuge at a price legally unavailable to competitors of that defendant so that the post-tensioning defendant could and did monopolize the post-tensioning market.

Respondent believes that the above questions should be answered in the negative and that they present no question upon which certiorari should be granted.

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## II.

## SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's statement of the case is in most respects accurate but does contain meaningful omissions or inaccuracies based upon misinterpretation, misreading or misstatement of the facts of the case and the lower court's decisions. Some of the omissions are apparently due to defendants' myopic and academic disregard of the factual allegations of the complaint.

Contrary to defendants' statement of the case (Pet. p. 2),* the crux of the plaintiff's case as alleged in its complaint is *not* the conversion of dumping charges in violation of the 1921 dumping act into antitrust violations. The crux of plaintiff's case *is* that the defendants conspired to injure the competitors of one of the conspiring defendants (VSL), who was a post-tensioning competitor of plaintiff, and attempted to monopolize the post-tension-

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*The following abbreviations will be used throughout this brief:

Pet.: The Petition for Writ of Certiorari;

App.: The Appendix A to the Petition for Writ of Certiorari;

Court of Appeals: United States Court of Appeals for the Ninth Circuit;

District Court: United States District Court for the Northern District of California;

VSL: VSL Corporation, Inc., a California corporation;

Mitsui: Mitsui & Company (USA), Inc., a New York corporation;

Shinko: Shinko Wire Co., Ltd., a Japanese corporation;

Losinger: Losinger AG, the Swiss corporate parent of VSL; and

Western: Western Concrete Structures Co., Inc., a California corporation.

ing business. This was done by providing, through conspiracy, subterfuge and fraud, the post-tensioning strand to the post-tensioner defendant VSL at prices lawfully unavailable to competitors of VSL, including plaintiff. As set out in the Court of Appeals decision (App. p. 2) the price of steel strand significantly affects a post-tensioning firm's competitive bidding position. The conspiratorial actions of the defendants were successful in injuring and excluding the competitors of VSL and resulted in VSL obtaining a monopolistic position in the post-tensioning industry.

It is not true as stated at Pet. p. 3, ¶ 3 that plaintiff Western "conceded that each sale in the chain was above the seller's average cost and thus was fully profitable to each defendant." What plaintiff did admit is quite different and is more accurately characterized by the Court of Appeals at the reference given by defendants (App. p. 3). The plaintiff did disclaim that it alleges that the post-tensioning strand sold by the supplier defendants Shinko-Mitsui-MBK was below cost or variable cost to Shinko. There was never an admission that *all* defendants did not sell below cost. Particularly the lack of below cost pricing allegations did not apply to VSL's sale or bid price as to which plaintiff has not yet been able to conduct discovery. The statement in defendants' petition (Pet. p. 6), coupled with the footnote, is carefully couched to reverse the coin and say that plaintiff admitted that all prices were profitable to all defendants—*this is not so.*

From declination by plaintiff to allege below cost pricing between the defendant suppliers and defendant VSL, defendants have made wide excursions to the effect that all defendants profited, which was never admitted. After an improper statement of plaintiff's position, de-

fendants have attempted to reduce that statement to a definitional discussion of predatory pricing in what should be a futile attempt to engage the attention of this Court.

*This case was decided only on the pleadings*—no discovery has been conducted. No answer has been filed. No trial has been had.

## III.

## SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied. There are no special and important reasons for review by this Court; the Court of Appeals in this case did not render a decision in conflict with the decision of another federal court of appeals. There is also no decision on a federal question which is in conflict with any applicable decisions of this Court. (Rules of the Supreme Court of the U.S., Rule 17.)

Throughout their petition, defendants have ignored the facts of plaintiff's complaint and have set up academic straw-men. This is *not* a case which attempts to define predatory pricing to which the defendants constantly allude. The defendants attempt to focus on this factor while ignoring the factual thrust of plaintiff's complaint and the application of those facts to a motion to dismiss which was decided by the Court of Appeals.

As succinctly stated by the Court of Appeals, the complaint alleged the essential elements of a Sherman Act, Section 1 violation (15 U.S.C. § 1) in that the complaint clearly alleged (1) a *conspiracy* between each and all of the defendants; (2) that the conspiracy was *in restraint of trade or commerce;* and (3) that the *object and intent*

of the conspiracy was "*to injure VSL's competitors and drive them out of the market;*" and (4) that the *object was successful.* (App. pp. 5, 6.)

The plaintiff has consistently maintained that the defendants had conspired to engage in predatory *conduct.* The defendants have consistently taken the position that inasmuch as *one* element of that predatory conduct was to violate what they term a protectionist statute that such violation is procompetitive. Even assuming *arguendo* that the government regulation circumvented by the defendants is, in the abstract "protectionist", it is a quantum and illogical leap to classify as immune from antitrust scrutiny a course of *predatory conduct* which includes an act of circumvention of the protectionist statute. The course of activities engaged in by defendants was intended to and did result in a restraint of trade and in particular, suppression, exclusion and injury to VSL's competitors in the post-tensioning business, including the plaintiff Western.

Moreover, the Court of Appeals found that Western's allegations adequately show the necessary anticompetitive or predatory conduct which is essential to its three claims under Section 2 of the Sherman Act (15 U.S.C. § 2) for attempt to monopolize, monopolization and conspiracy to monopolize. (App. pp. 7, 8.) Western adequately alleged exclusionary conduct unaccompanied by a legitimate competitive effect or motive. Such conduct pursuant to the conspiracy engaged in by the supplier defendants included providing to the conspirator post-tensioner defendant, VSL, steel strand at a price below the price that any competitor of VSL could lawfully obtain such steel strand and VSL's underbidding of its competitors. VSL's resultant ability to underbid its competitors was not based

in any way upon an enhancement of the quality or attractiveness of the services provided by VSL, nor was it in response to legitimate competitive market pressures, nor did it alter the demand function that all competitors confront nor was it based upon business acumen. Rather, the sole purpose of the conduct was to discipline or eliminate competition so as to later provide VSL benefits derived from exclusion of its competitors. This naturally exclusionary conduct, not based upon any particular efficiencies or a superior product, resulted in VSL obtaining a monopoly position. Such conduct is precisely that intended to be proscribed by Section 2 of the Sherman Act and is recognized in all the circuits as illegal conduct.

*No conflict in the circuits exists with respect to the instant decision.*

## IV.

## ARGUMENT

### 1. THE COURT OF APPEALS' DECISION IS NOT CONTRARY TO THIS COURT'S DECISIONS

In Section I-A of their petition, the defendants have again totally ignored the factual thrust of plaintiff's complaint of which the Court of Appeals took cognizance. Thus, at Pet. p. 6, ¶ 2, defendants state that plaintiff alleges that "VSL and Mitsui engaged in purchase and sales transactions in steel strand at prices that 'violated' the 1921 Antidumping Act and the Trigger Price Mechanism." That statement should be compared, as the Court of Appeals did in its decision at App. pp. 5, 6, to the actual allegations of the complaint (¶¶ 41-46) (App. pp. 34-36). Paragraph 41 reads as follows (App. p. 34):

> At least as early as January 1, 1978 . . . and continuously thereafter up to about June of 1981 within the Northern District of California and elsewhere defendants Mitsui (Japan), Mitsui (USA), Shinko, Losinger and VSL through their officers and agents . . . did unlawfully, knowingly and willfully conspire, combine and agree together, with each other, and with diverse other persons both known and unknown to plaintiff to enter into conspiratorial agreements, (as set out more particularly in preceding paragraphs 27 and 32 and in paragraph 42 hereinafter) which were intended to harm or unreasonable restrain competition, (as set out more particularly in preceding paragraphs 33, 34 and 35 and in paragraphs 43-45 hereinafter) which actually caused injury to competition, including plaintiff, (as set out more particularly in preceding paragraph 28, and paragraphs 46 and 47 hereinafter) in violation of 15 U.S.C. § 1 and § 15.

The second paragraph of that section of defendants' petition (Pet. p. 4) has been discussed. It states that plaintiff "declined to plead that the low prices of which it (plaintiff) complained were below any measure of cost. It is true that plaintiff stated that it *would not attempt* to prove the price versus cost to Shinko—the practicalities so dictated. For a private person or small company to launch upon discovery to prove such an allegation would be prohibitively expensive. But *this is not the crux* nor even an essential element of plaintiff's case as alleged. The necessary allegations with respect to Sherman Act, Section 1 are as set out above.

Defendants' application of their trilogy of cases including the case of *United States v. Citizen & Southern National Bank*, 422 U.S. 86 (1975) cited in their Section 1A (Pet. p. 9) is so strained as not to be relevant to the facts of this case. The Court of Appeals correctly distinguished this case in its decision (App. p. 8) wherein it stated:

The third case is *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975). The facts there are so different from the facts here that the case is hardly relevant. Moreover, it was not a pleading case. The court did not suggest, much less say, that a conspiracy to circumvent anti-competitive government restrictions, to the damage of competitors, can never be a violation of Section 1 of the Sherman Act.

## 2. THE COURT OF APPEAL'S DECISION CONCERNING SHERMAN SECTION 1 DOES NOT CONFLICT WITH OTHER LOWER COURT AUTHORITIES WHEN THE FACTS OF THOSE CASES ARE CONSIDERED

The three circuit court decisions relied upon by petitioners are not, after properly reviewing their factual settings and holdings, in conflict with the Ninth Circuit decision in the instant case. Rather, petitioners attempt, by stretching the facts and conclusions of those cases and conveniently ignoring other important facts and holdings which clearly distinguish those cases, to support a non-existent conflict in the circuits. The Court of Appeals analyzed the cases cited by defendants and distinguished each of them in its decision at App. p. 6, 7, 8.

A brief review of each of those cases establishes the fallacy of petitioners' position.

1. *Zenith. Zenith case* [*In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 105 S.Ct. 1863 (1985)] has a factual situation so far removed from the instant case as to be nearly meaningless. Moreover, to the extent that it is similar, it supports the plaintiff's position.

In *Zenith*, American television manufacturers brought an action against Japanese television *manufacturers* and

their importer/distributor subsidiaries and also included one American retailer, Sears. Plaintiffs alleged "a conspiracy to drive all American manufacturers of television receivers out of business by a 'scheme to raise, fix and maintain artificially high prices for television receivers sold by defendants in Japan and, at the same time, to fix and maintain low prices for television receivers exported to and sold in the United States." *In re Japanese Electronics Products*, 723 F.2d 238, 251 (3d Cir. 1983). Additionally, the *Zenith* plaintiffs charged that the pricing activities of defendants violated the 1916 Antidumping Act. *Id.*

In the instant case, the factual situation is quite different. The conspiracy alleged is vertical between Mitsui (Japan)/Shinko/Mitsui (USA) and VSL/Losinger to provide to VSL steel strand at prices legally unavailable to its competitors with the intent to allow VSL to exclude its competitors from the marketplace. One of these competitors is Western. Western is not situated in the same position as the plaintiffs in the *Zenith* cases. Unlike the *Zenith* plaintiffs, Western is not a competitor of the manufacturers but rather of the customer, VSL. Moreover, in *Zenith*, Sears was not situated in the same place as plaintiffs' competitors; namely the manufacturers. Thus, the conspiracy alleged which was to have involved Sears also was a conspiracy directed at ousting other manufacturers, not Sears' competitors. This issue was *never* raised. Moreover, the facts of the case indicate that there were a substantial number of "preferred" customers of the Japanese defendant manufacturers making it highly improbable that competition as a whole on Sears' level would be affected as it was in the instant case.

The district court in *Zenith,* after extensive discovery and accumulation of a massive record, granted defendants' motion for summary judgment finding the essential elements of this horizontal conspiracy not present. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.,* 513 F.Supp. 1100, 1333 (E.D. Pa. 1981). This is contrary to the facts of conspiracy in this case.

In affirming the dismissal with respect to the peripheral defendant Sears, the Third Circuit did not, as appellees have stated, rely on the asserted "procompetitive" conduct of the defendants in circumventing the dumping laws, but rather indicated that *there was no independent evidence connecting Sears to the alleged conspiracy. See In re Japanese Electronic Products,* 723 F.2d at 313. It was not an issue before the court that such conspiracy affected Sears' competitors on a vertical level. Consequently, the issue is not even addressed by the Third Circuit. Specifically, the Third Circuit concluded that Sears' covering up of secret rebates did not give rise to an inference that it was involved in the alleged home market or export conspiracy. *Id.* at 312.

To the extent that the factually distinguishable *Zenith* decisions are relevant to the instant case, they show that a conspiracy including dumping activities combined with an attempt to force out competitors on *some level can* constitute antitrust violations. *As such they support rather than defeat appellant's position.* Moreover, the *Zenith* appeal decision emphasizes the importance of analyzing each case in light of its own facts. Doing so here emphasizes the inappropriateness of claiming a conflict between the Third Circuit and the Court of Appeals regarding the *Zenith* decision and the instant case.

2. *Knuth. Knuth II* [*Knuth v. Erie-Crawford Dairy Cooperative Ass'n,* 463 F.2d 470 (3d Cir. 1972)] cited by appellees as one of the cases in their "trilogy" is the second of two appeals in the same Third Circuit case. In *Knuth I* [*Knuth v. Erie-Crawford Dairy Cooperative Ass'n,* 395 F.2d 420 (3d Cir. 1968)], a dismissal of the complaint was reversed and the case remanded. In *Knuth II,* the court granted defendants' motion for a directed verdict with respect to the antitrust claim. This order was upheld by the appeal court.

The Court of Appeals recognized that *Knuth* is no precedent for the present case (App. p. 7). The only commonality of facts to this case is the breach of a regulation or statute. The orientation of the parties is inapposite to the present case. In *Knuth,* three hundred milk producers (i.e. dairy farmers), members of a cooperative, were plaintiffs against their own co-op as defendant and the dairies (processors) who were the customers of the co-op. In *Knuth,* the court simply found that no evidence of a conspiracy existed and specifically that the various dairies did not know that the other dairies were getting similar discounts nor was their action concerted in any way.

This case is clearly factually distinguishable from the instant case where the plaintiff Western is the distributor just like the dairies were. Moreover, various dairies were getting the advantages, whereas in the instant situation, only Western's competitor VSL was getting the unlawful price break. Therefore, again this case does not raise a conflict in the circuits but merely stands for the proposition that no evidence of a conspiracy was shown.

3. *Sutliff.* In *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648 (7th Cir. 1984), the court dismissed a Sherman Act claim primarily based upon a finding that the requisite proof of injury to competition had not been shown by the acts of the defendants. The court stated in this regard:

> To injure, even to cripple or destroy, one or two competitors in a market will not, if there are many competitors in that market, have much if any effect on consumers or anyone else besides the competitors in question. But that is the only type of injury alleged in this case. The complaint alleges no competitive injury in the antitrust sense; defines no market; refers to no market-wide anticompetitive effects, actual or probable. So far as appears from the complaint there are many wholesalers of oil serving Appleton, and if so then weakening or even dstroying Ellingsen and Land-O-Lakes might have no effect on the market for oil as distinct from the prosperity of two sellers.

*Id.* at 655.

However, this is certainly not the instant case where Western's second amended complaint alleges competitive injury in the antitrust sense, defines the market and specifically refers to marketwide anticompetitive effects, probable and actual, as a result of the activities of the conspirators.

Again, this case establishes no conflict between the circuits but merely stands for the proposition that under the facts of *Sutliff* the necessary allegations had not been made for an antitrust violation. Such is not the case here, and from review of the *Sutliff* decision it seems clear that if the Seventh Circuit had been confronted with the allegations in the instant case, it would have found them sufficient.

Consequently, from review of the three claimed conflicting decisions, it is apparent that based upon their facts they are all distinguishable from the instant case and do not stand for a true conflict in the application of the law to the facts. Rather, they stand for the conclusion that where no evidence of conspiracy is shown, dismissal of antitrust claims premised on such a conspiracy is proper, and that where no allegation of injury to competition, as compared to injury to a competitor, exists, that dismissal of an antitrust claim is proper. Neither of these circumstances exist here.

### 3. CERTIORARI SHOULD BE DENIED TO EXAMINE THE SECTION 2 FINDINGS OF THE NINTH CIRCUIT AS THIS CASE CLEARLY INVOLVES PREDATORY CONDUCT AND IS NOT IN CONFLICT WITH ANY OTHER CIRCUITS

The Court of Appeals opinion regarding the Sherman Act, Section 2 claim was premised upon its finding that under the facts alleged Western had satisfied the pleading requirements and particularly the predatory conduct element of the claims. See opinion at App. p. 10. In defining predatory conduct, the Court of Appeals quoted from its decision in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F2d 1014, 1030-31 (9th Cir. 1981), *cert. denied* 103 S.Ct. 57 (1982) wherein such conduct was labelled as "not true competition . . . its purpose is to create a monopoly by means other than fair competition."

The conduct alleged by Western satisfied the latter requirement, and specifically established the anticompetitive character of defendant's conduct. An allegation of predatory pricing, i.e. below unit or variable cost, is *not*

necessary for pleading a violation of Section 2 of the Sherman Act for attempt to monopolize or for actual monopolization or conspiracy to monopolize. Rather, predatory pricing, where appropriate, is but one form of recognized predatory or anticompetitive conduct which satisfies the conduct requirement of properly pleading a claim under Section 2 of the Sherman Act. *See e.g. William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030-31 (9th Cir. 1981); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983) (a case cited by petitioners); *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 729 F.2d 1050, 1055 (6th Cir. 1984) (a case cited by petitioners); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 722-23 (5th Cir. 1975); *D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1247 (9th Cir. 1982).

In the instant case, the Court of Appeals in determining that the allegations of the plaintiff were adequate to support a claim under Section 2 of the Sherman Act viewed the particular factual setting in arriving at its conclusion that as alleged the facts showed anticompetitive or predatory conduct.

Defendants' petition attempts to improperly assume that the claims involved are predatory pricing claims and totally neglects the fact that *the necessary allegations are for predatory conduct* which can be satisfied by a number of various activities *only one of which may be predatory pricing* in the more classic sense.

It is clear that the instant case is not a proper means by which to reconsider the Transamerica decision as this

decision is not the basis upon which the Court of Appeals ruled with respect to Western's Section 2 claims. Rather, the factual setting of that case is as different from the instant case as are all the proposed conflicting decisions of the other circuits set forth by defendants. Whether sales below cost occurred or did not occur is not the issue, as the conduct alleged to have been involved is predatory in either case. Defendants' constant preoccupation with "predatory pricing" has resulted in their restricted vision of what was simply and straightforwardly pleaded as predatory conduct.

While this case *is not a classic predatory pricing case,* the economic results are exactly the same as if predatory pricing occurred due to the unusual factual situation. The common bane of predatory pricing and this case is the exclusion of competitors not based upon any economic efficiency or other business acumen with the intended result of monopolizing the business and extracting monopoly profits. Such activity is *not* procompetitive, but inherently anticompetitive. This is exactly what the Court of Appeals determined.

Even assuming arguendo that the antidumping laws are protectionist, circumvention by one competitor does not create competition, but rather results in exclusion of the other law abiding competitors, by unlawful means. Congress could not have intended that to remain in competition you would have to break one of its laws.

The cases cited as conflicting with the instant decision set forth exactly the same economic considerations as above even though they were described as predatory pricing cases. For example, as is set forth in *Barry*

*Wright Corporation v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983), the exclusionary conduct definition is precisely the conduct alleged in the instant case.

Petitioners fail to address the factual distinctions between the "conflicting" cases cited and the instant case, rather relying on the Transamerica facts to establish similarity of cases. This comparison is inappropriate for deciding whether certiorari should be granted in the instant case. Moreover, petitioners, while failing first to consider that predatory conduct is all that is legally necessary, then ignore the facts and treat the law in a vacuum. When comparing cases in making a claim that a conflict in the circuits exist, *reference to the facts is crucial,* otherwise a meaningless comparison between apples and oranges occurs, as here.

Petitioners urge that under the standards now set forth by the Court of Appeals administration of the Section 2 claim is unworkable as a potential defendant cannot tell whether his sales will result in liability or not. This claim is clearly specious in the instant case. *This is not the Transamerica case, this is the Western Concrete case.* Here, as alleged, defendants imported steel at prices *below* a set governmental price, fraudulently doctored papers to show that it was above this set price and, then when caught, paid countervailing duties on this set price and various criminal fines. *Defendants knew exactly the cut-off price between legal and illegal conduct.* Such a number is easy to administer. Consequently, this conduct coupled with its underbidding tactics all in furtherance of its intent to exclude competitors is no more difficult to administer than any other Section 2 claim.

## V.

## CONCLUSION

In view of the inappropriate characterization of the instant matter as a predatory pricing case by petitioners, the clear predatory conduct alleged by Western, the anticompetitive effects of defendants' conduct, the ease of administration of determining whether illegal conduct is involved and the non-conflict of this case with other circuits, it is clear that this case is not proper for granting a writ of certiorari.

Respectfully submitted,

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